(1)

NO. 03149 APR 28 2004

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ALICE PAYNE,

Petitioner,

v.

JOHNNY LEE RILEY JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTINE O. GREGOIRE
Attorney General
William Berggren Collins
Senior Assistant Attorney General
John J. Samson*
Assistant Attorney General
Paul D. Weisser
Senior Counsel
**Counsel of Record*
PO Box 40116
Olympia, WA 98504-0116
360-586-1445

QUESTIONS PRESENTED

In a claim of ineffective assistance of counsel under the Sixth Amendment, *Strickland v. Washington*, 466 U.S. 668 (1984) held that judicial scrutiny of counsel's performance must be highly deferential. Is counsel's decision not to call a witness at trial entitled to less deference when counsel does not personally interview the witness?

PARTIES

The Petitioner is Alice Payne, the Superintendent of the McNeil Island Corrections Center. The Respondent is Johnny Lee Riley, Jr.

TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI.....1

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISIONS INVOLVED.....2

STATEMENT.....2

REASONS FOR GRANTING THE PETITION.....7

1. The Ninth Circuit's "Less Deference" Rule Conflicts With The Decisions Of This Court And The Federal Courts Of Appeal.....8

2. The Impact Of the "Less Deference" Rule Is Substantial Because It Shifts The Burden From Petitioner To The Government.....12

CONCLUSION.....16

TABLE OF AUTHORITIES

Cases

Alcala v. Woodford,
334 F.3d 862 (9th Cir. 2003) 8

Blackburn v. Foltz,
828 F.2d 1177 (6th Cir. 1987) 11

Bryant v. Scott,
28 F.3d 1411 (5th Cir. 1994) 10

Chandler v. United States,
218 F.3d 1305 (11th Cir. 2000) 11

Huffington v. Nuth,
140 F.3d 572 (4th Cir. 1998) 10

Jones v. Jeffison,
20 F.3d 849 (8th Cir. 1994) 11

Lema v. United States,
987 F.2d 48 (1st Cir. 1993) 10

Lewis v. Mazurkiewicz,
915 F.2d 106 (3rd Cir. 1990) 10

Lord v. Wood,
184 F.3d 1083 (9th Cir. 1999),
cert. denied 528 U.S. 1198 (2000) 8

Maddox v. Lord,
818 F.2d 1058 (2nd Cir. 1987) 10

State v. Riley,
137 Wn.2d 904, 976 P.2d 624 (1999) 3

Strickland v. Washington,
466 U.S. 668 (1984) ..... passim

Sullivan v. Fairman,
819 F.2d 1382 (7th Cir. 1987) 11

United States v. Snyder,
787 F.2d 1429 (10th Cir. 1986) 11

Wiggins v. Smith,
123 S. Ct. 2527 (2003) 9, 10

Williams v. Head,
185 F.3d 1223 (11th Cir. 1999) 15

Williams v. Taylor,
529 U.S. 362 (2000) 14

Statutes

28 U.S.C. § 1254 1

28 U.S.C. § 2254 ..... 4, 5, 6, 14

Other Authorities

Anne M. Voigts,
Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel,
99 Columbia L. Rev. 1103, 1118 (1999) 15

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) 13

David M. Siegel,
My Reputation or Your Liberty(Or Your Life): The Ethical Obligations of Criminal Defense Counsel in PostConviction Proceedings, 23 J. Leg. Pro. 85 (1999) 14, 15

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Alice Payne, the Superintendent of the McNeil Island Corrections Center, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 352 F.3d 1313. App. 1a-27a. The court's order denying the petition for rehearing and rehearing en banc is unpublished. App. 28a. The report and recommendation of the United States Magistrate Judge and the order of the United States District Court for the Western District of Washington are unpublished. App. 30a-54a. The ruling denying review issued by the Commissioner of the Washington Supreme Court and the Washington Supreme Court's order denying the motion to modify the commissioner's ruling are unpublished. App. 55a-63a. The order of the Washington Court of Appeals dismissing respondent's personal restraint petition is unpublished. App. 64a-72a.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 2003. App. 1a. On January 30, 2004, the court of appeals issued an order denying a timely petition for rehearing and rehearing en banc. App. 28a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense".

STATEMENT

This case involves the claim that trial counsel provided ineffective assistance by not interviewing and calling a witness to corroborate respondent's claim of self-defense. To prevail in such a claim, the defendant must show that "counsel's representation fell below an objective standard of reasonableness" and that "the deficient performance prejudiced the defense". *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "Judicial scrutiny of counsel's performance must be highly deferential". *Id.* at 689. In this case, the Ninth Circuit was not highly deferential to counsel's performance. Rather, the court applied a rule that if a lawyer does not interview a witness, his decision not to put the witness on the stand "will be entitled to less deference than if he interviews the witness". App. 13a. The question presented in this case is whether there is an exception to the rule that judicial scrutiny of counsel's performance must be highly deferential.

Respondent Johnny Riley was convicted of assault for shooting Gustavo Jaramillo. On the day of the shooting, Jaramillo and Aaron Calloway possessed a stolen car and a stolen 9-mm semiautomatic pistol. Riley approached Jaramillo and asked about purchasing the car and the pistol. Then Riley left and when he returned a short time

later he was accompanied by Edward Pettis. Riley claimed that he shot Jaramillo in self-defense. He testified that he made some comments about Jaramillo's gang after which Jaramillo threatened to shoot him. Riley claimed that in response to this threat he pulled his gun and that when Jaramillo reached for his gun Riley shot him. Calloway and other witnesses testified that Jaramillo's hands were by his head and that he did not reach for his gun when Riley shot him. Pettis did not witness the shooting because he ran away before it occurred. The jury did not believe Riley's self-defense claim and convicted him. His conviction was affirmed on direct appeal. *State v. Riley*, 137 Wn.2d 904, 976 P.2d 624 (1999).

Riley filed a personal restraint petition in the Washington Court of Appeals challenging his conviction. Among his claims was that trial counsel was ineffective because he failed to interview and call Pettis as a witness. In an affidavit filed in support of Riley's petition, Pettis stated that he heard someone threaten to shoot Riley at which point he ran away. Pettis did not witness the shooting but he heard a shot and a few minutes later he saw Riley who said: "He tried to shoot me". The court dismissed Riley's petition because he did "not satisfy the *Strickland* prejudice prong". App. 69a-72a. The court reasoned that under Washington law a "defendant must show that aggressive or threatening behavior, gestures, or communication by the victim preceded the defendant's use of force". App. 70a. Riley's defense was based on his claim that "Jaramillo made a movement toward his gun". App. 71a. But Pettis's "testimony would only have corroborated Riley's assertion that he was

threatened". App. 71a. "Because Pettis ran away on hearing the threats, he was not present during the crucial moments immediately before Riley shot Jaramillo". App. 71a.

Riley sought review of the court of appeals' decision by the Washington Supreme Court. The court's commissioner denied review. App. 56a-63a. The commissioner recognized that "there is a strong presumption that counsel's representation was effective". App. 58a. For this reason the burden was on Riley to "show that there were no legitimate strategic or tactical reasons for counsel's challenged conduct". App. 58a. The commissioner concluded that Riley failed to "show that there was no legitimate tactical reason not to pursue Pettis as a witness". App. 58a. Pettis had a criminal record and initially mislead police about his knowledge of the incident. App. 58a. "Under the circumstances, counsel could have legitimately decided to concentrate on attacking the credibility of Jaramillo and Calloway, who themselves had criminal backgrounds". App. 58a. The commissioner also agreed with the court of appeals that Pettis "was not a witness to the critical events which ensued" so that there was "no reasonable probability that Pettis's testimony would have changed the outcome". App. 58a. Riley moved to have the Washington Supreme Court modify the commissioner's ruling. This motion was denied by the court. App. 55a.

Riley filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 in which he renewed his ineffective assistance claim. In considering this claim, the magistrate judge stated that there "is a strong presumption that counsel's performance fell within the wide range of reasonable assistance".

App. 45a. The judge also explained that under 28 U.S.C. § 2254(d)(1), Riley must establish that "the state court's adjudication of his constitutional claims 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'". App. 45a. The judge recommended denying Riley's ineffective assistance claim because "the state courts reasonably determined that [Riley] failed to meet the *Strickland* test". App. 47a. Because "Pettis ran away before the shooting occurred, he could have only verified that [Riley] was threatened. He had no way of knowing, other than by [Riley's] statements after the fact, whether [Riley] provoked the victim and caused the necessity to use self-defense". App. 58a. The district court adopted the report and recommendations of the magistrate judge and denied Riley's petition. App. 30a-31a.

Riley appealed this decision to the court of appeals, which reversed. The Ninth Circuit first concluded that trial counsel's "failure to interview Pettis rendered his performance below an objective standard of reasonableness". App. 14a. Since counsel did not personally interview Pettis, the Ninth Circuit's review of counsel's performance was not highly deferential. Rather, the court applied the following rule:

> "[W]here (as here) a lawyer does not put a witness on the stand, his decision will be entitled to less deference than if he interviews the witness". App. 13a.

The Ninth Circuit emphasized that the "government has provided no testimony of counsel as

to why he did not contact Pettis". App. 14a. In light of the government's failure to provide evidence about trial counsel's strategy, the court concluded that "the record shows that counsel did not make a reasonable professional judgment to ignore an important corroborating witness". App. 14a.

The Ninth Circuit also held that there was prejudice because "there is a reasonable probability that, but for [trial counsel's] failure to interview or call Pettis, the verdict would have been different". App. 19a. The court acknowledged that "Pettis could not testify whether Riley, with his gun pointed at Jaramillo, saw Jaramillo move as if to go for his gun, leading to a legitimate self-defense shooting". App. 15a. The court also recognized that a "verbal threat *alone* would not have justified Riley shooting Jaramillo". App. 16a n.5. Nevertheless, the court suggested that if "the jury thought Riley pulled his gun only in response to Jaramillo's threat to shoot Riley, then Riley's pointing a gun at Jaramillo might be understandable as a defensive action". App. 16a. The court also suggested that Pettis's testimony about the threat would have assisted Riley's credibility and "created more equilibrium in the evidence presented to the jury". App. 17a. Finally, the court said that Pettis's testimony about the threat to shoot Riley would have corroborated Riley's claim that he was not the first aggressor in the situation. App. 18a.

Having concluded that there was ineffective assistance of counsel, the Ninth Circuit turned to the standard of review required by 28 U.S.C. § 2254(1)(d). The court concluded that "the Washington court was purporting to apply *Strickland's* tests" so the decision was not "contrary

to the law that the Supreme Court of the United States established in *Strickland*". App. 21a. The court also found that there were "no unreasonable factual determinations in the Commissioner's opinion". App. 22a. However, the court did conclude that "there was an unreasonable application of *Strickland*" which was "objectively unreasonable". App. 23a. The court repeated its conclusion that Pettis's testimony might have assisted the determination of whether Riley was the first aggressor. The court also suggested that Riley's statement to Pettis—after the fact—that "he tried to shoot me" might have been admissible as an excited utterance. App. 23a. The court dismissed as speculative the Washington Supreme Court Commissioners reasoning that tactical reasons for not calling Pettis could have included his criminal record and the fact that he initially mislead police about his knowledge of the incident. App. 24a. Based on this conclusion, the Ninth Circuit reversed the district court.[1] The state filed a timely motion for rehearing and rehearing en banc, which was denied. App. 28a.

REASONS FOR GRANTING THE PETITION

There are two important reasons for granting the petition. First, the Ninth Circuit's "less deference" rule is in conflict with the decisions of this Court and the federal courts of appeal, which recognize that judicial review of trial counsel's performance must be

---

[1] Ineffective assistance of counsel was not the only claim Riley raised in his petition for a writ of habeas corpus. Since the Ninth Circuit granted the ineffective assistance claim, it did not reach the other claims contained in Riley's petition. App. 27a. n.10.

highly deferential The Ninth Circuit's "less deference" rule is unique. Second, the impact of this rule is substantial. The less deference rule shifts the burden of proof from the petitioner to the government. It requires the government to prove why trial counsel made the decision not to interview and call a witness. Since the state is not privy to trial counsel's strategy, it is in a poor position to meet this burden.

1. The Ninth Circuit's "Less Deference" Rule Conflicts With The Decisions Of This Court And The Federal Courts Of Appeal

In this case Riley claims that trial counsel was ineffective because he did not interview or call Pettis as a witness. The Ninth Circuit applied its "less deference" rule. According to the court:

> "[W]here (as here) a lawyer does not put a witness on the stand, *his decision will be entitled to less deference* than if he interviews the witness". App. 13a (emphasis added).

The reason for this rule is the Ninth Circuit's view that "a lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor—factors we are not in a position to second-guess". App. 13a. This case does not represent an isolated application of the less deference rule. It is the law in the Ninth Circuit and has been applied in other cases. *See Lord v. Wood*, 184 F.3d 1083, 889-90 (9th Cir. 1999), *cert. denied* 528 U.S. 1198 (2000); *Alcala v. Woodford*, 334 F.3d 862, 889-90 (9th Cir. 2003).

The Ninth Circuit's less deference rule conflicts with the decisions of the Court, which require that judicial scrutiny of trial counsel's performance be highly deferential. In *Strickland*,

one of the defendant's claims was that trial counsel failed to investigate and call character witnesses. In evaluating this claim the court explained that "[j]udicial scrutiny of counsel's performance must be highly deferential". *Strickland*, 466 U.S. at 689. The reason for this deferential review is that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable". *Id.* Thus, "to eliminate the distorting effects of hindsight [] a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance". *Id.* The burden is on the defendant to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategic'". *Id.*

This Court in *Strickland* did not adopt a different rule when the claim was that trial counsel was ineffective because he or she failed to investigate or personally interview witnesses. The Court recognized that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary". *Id.* However, even when evaluating trial counsel's investigative decisions for reasonableness the Court requires "applying a heavy measure of deference to counsel's judgments".

There is nothing in *Strickland* or any of the Court's later decisions that suggests that trial counsel's decision not to interview or call a witness is entitled to less deference if the attorney does not personally interview the witness. For example, last year in *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), this Court held that trial counsel's decision not to expand

the investigation into the defendant's life history during the penalty phase of a capital case was ineffective. However, the Court assessed the reasonableness of the decision not to investigate "applying a heavy measure of deference to counsel's judgments". *Wiggins*, 123 S. Ct. at 2535.

The Ninth Circuit's less deference rule conflicts with decisions of federal courts of appeal. None of them has adopted a rule that trial counsel performance is entitled to less deference if he or she does not personally interview a witness that is not called to testify. All of these circuits apply a heavy measure of deference when considering a claim that trial counsel decision not to investigate was ineffective. *See Lema v. United States*, 987 F.2d 48, 54 (1st Cir. 1993) (claim that trial counsel neither interviewed nor presented potential defense witness) (the court "must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance"); *Maddox v. Lord*, 818 F.2d 1058, 1061 (2nd Cir. 1987) (same) ("there is a strong presumption that counsel's conduct was reasonable and that any challenged action might be considered sound trial strategy"); *Lewis v. Mazurkiewicz*, 915 F.2d 106, 113 (3rd Cir. 1990) (same) ("*Strickland* instructs we must apply a heavy measure of deference to counsel's judgments"); *Huffington v. Nuth*, 140 F.3d 572, 581 (4th Cir. 1998) (same) ("when evaluating a decision not to investigate further, we must regard counsel's choices with an eye for reasonableness in all the circumstances, apply a heavy measure of deference to counsel's judgments"); *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) (same) (the court "give great deference to counsel's assistance strongly

presuming that counsel has exercised reasonable professional judgment"); *Blackburn v. Foltz*, 828 F.2d 1177, 1180 (6th Cir. 1987) (same) ("court's scrutiny of counsel's performance must be highly deferential and must strongly presume that counsel's advocacy fell within the wide range of reasonable professional assistance"); *Sullivan v. Fairman*, 819 F.2d 1382, 1391 (7th Cir. 1987) (same) (in "reviewing counsel's decision not to investigate the court must apply a heavy measure of deference to counsel's judgments"); *Jones v. Jeffison*, 20 F.3d 849, 857 (8th Cir. 1994) (same) ("a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"); *United States v. Snyder*, 787 F.2d 1429, 1431 (10th Cir. 1986) (same) ("Judicial scrutiny of counsel's performance must be highly deferential"); *Chandler v. United States*, 218 F.3d 1305, 1318 (11th Cir. 2000) (same) (in "any ineffective assistance case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment").

The Ninth Circuit's "less deference" rule stands alone and there is no basis for it in this Court's decision. According to the Ninth Circuit the rational for the less deference rule is that "a lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor—*factors we are not in a position to second-guess*". App. 13a (emphasis added). The problem with this rational is that the reviewing court is never authorized to "second-guess" trial counsel's performance—whether or not counsel personally interview's a witness. Indeed, the reason that *Strickland* requires that judicial scrutiny must be

highly deferential is to prevent second-guessing by the reviewing court. *Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable".).

The Court should exercise its jurisdiction and bring the Ninth Circuit into conformance with its decisions and with those of the other courts of appeal.

2. The Impact Of the "Less Deference" Rule Is Substantial Because It Shifts The Burden From Petitioner To The Government

The Ninth Circuit's less deference rule is not simply a misstatement of the law with no practical consequences. It has the significant practical effect of shifting the burden of proof from the defendant to the government.

According to this Court, when a defendant claims that trial counsel's performance was ineffective, the burden is on the defendant. The "defendant must show that counsel's representation fell below an objective standard of reasonableness". *Strickland*, 466 U.S. at 688. The "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy". Both the Washington Supreme Court Commissioner and the district court recognized that the burden was on Riley to establish that trial counsel was ineffective.

App. 45a, 59a. In contrast, the Ninth Circuit put the burden on the government to prove that trial counsel's performance was not ineffective. App. 14a ("The government has provided no testimony of counsel as to whey he did not contact Pettis").

This shifting of the burden is significant for three reasons. First, it essentially allows the reviewing court to second guess trial counsel's performance. That is what the Ninth Circuit did in this case. Even though the court acknowledges that Pettis did not see the shooting and that a verbal threat alone would not have justified Riley's shooting Jaramillo, the court found trial counsel's performance was deficient and there was prejudice. The Ninth Circuit focuses on the fact that Pettis could testify about the threat to shoot Riley. The court ignores the fact that trial counsel, on cross examination of Calloway, confirmed most of Riley's testimony—that Riley commented about Jaramillo's gang; that the situation became tense because unfamiliarity with a gang was a sign of disrespect; and that such disrespect could lead to a violent confrontation. Trial counsel did this without having to deal with Pettis's criminal record or the fact that he initially mislead police about the incident. The Ninth Circuit's conclusion that Riley's statement "he tried to shoot me" would have been admitted in evidence as an excited utterance is nothing more than a decision—in hindsight—about a different way to try the case.

Shifting the burden of proof is also inconsistent with the standard of review in habeas corpus cases established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

28 U.S.C. § 2254(d) "placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners". *Williams v. Taylor*, 529 U.S. 362, 399 (2000). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly". *Id.* at 411. The federal court may grant habeas relief only if the state court application of federal law was objectively unreasonable. *Id.* Here, the state court concluded that Riley did not meet his burden of overcoming the strong presumption that trial counsel's performance was effective. The Ninth Circuit reached the opposite conclusion because it applied the less deference rule and held that the government did not meet its burden. The Ninth Circuit says that the state court's conclusion is objectively unreasonable. But this conclusion rests on the Ninth Circuit's application of the less deference rule and the shifting of the burden of proof. If the Ninth Circuit applied the proper standard, it could not conclude that trial counsel's performance was objectively unreasonable.

The second problem with shifting the burden of proof is that the government is in a poor position to explain trial counsel's strategy. Of course, during the trial the government is not privy to defense counsel's strategy. In a later challenge based on ineffective assistance, trial counsel may or may not assist the government in explaining why he or she did certain things. At least one commentator has suggested that trial counsel has an ethical obligation to assist a former client is establishing that his performance was ineffective. David M. Siegel, *My*

Reputation or Your Liberty (Or Your Life): The Ethical Obligations of Criminal Defense Counsel in Post Conviction Proceedings, 23 J. Leg. Pro. 85 (1999). If trial counsel is actively assisting the defendant in establishing that his or her performance was ineffective, the government will have a very difficult time meeting this burden of proof. Of course, under *Strickland* there is nothing wrong with trial counsel assisting the defendant in a post-conviction proceeding because the burden is on the defendant to establish that trial counsel's performance was ineffective. It is only when the burden is shifted that this becomes a problem.

The third reason that the less deference rule—and the shifting burden—are important is that claims of ineffective assistance are common and the claim that trial counsel failed to interview a witness is easily made. Thus, the less deference rule has a significant impact. Ineffective assistance claims are the most frequently filed claims in both federal and state post conviction relief proceedings. Anne M. Voigts, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 Columbia L. Rev. 1103, 1118 (1999). Moreover, claims that trial counsel failed to interview a witness after the fact are easily made. As the Eleventh Circuit observed in *Williams v. Head*, 185 F.3d 1223, 1236 (11th Cir. 1999), "it is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstances, had they been called". Under the Ninth Circuit's rule, if a defendant claims trial counsel did not interview a witness, counsel's decision is entitled to less deference and the

government has the burden of explaining why counsel did not interview and call the witness. Thus, the less deference rule will have a substantial impact on habeas corpus cases.

In light of the significance of the less deference rule, the Court should exercise its jurisdiction and bring the Ninth Circuit into conformance with the decision of this court and with those of the other courts of appeal.

CONCLUSION

For the reasons stated herein the petition should be granted.

RESPECTFULLY SUBMITTED,

CHRISTINE O. GREGOIRE
Attorney General
State of Washington
William Berggren Collins
Senior Assistant Attorney General
John J. Samson*
Assistant Attorney General
Paul D. Weisser
Senior Counsel
**Counsel of Record*
PO Box 40116
Olympia, Washington 98504-0116
360 586-1445
April 2004

(2)

03148 APR 28 2004

NO. _____

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ALICE PAYNE,

Petitioner,

v.

JOHNNY LEE RILEY JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO THE

PETITION FOR A WRIT OF CERTIORARI

CHRISTINE O. GREGOIRE
Attorney General
William Berggren Collins
Senior Assistant Attorney General
John J. Samson*
Assistant Attorney General
Paul D. Weisser
Senior Counsel
**Counsel of Record*
PO Box 40116
Olympia, WA 98504-0116
360-586-1445

TABLE OF CONTENTS

Description	Page
Opinion, *Riley v. Payne*, 352 F.3d 1313 (9th Cir. 2003)	1a
Order Denying Petition For Rehearing, *Riley v. Payne*, Ninth Circuit Cause No. 03-35054, filed January 30, 2004	28a
Judgment In A Civil Case, *Riley v. Payne*, U.S.D.C. Western District of Washington Cause No. C02-5108RJB	29a
Order Adopting Report And Recommendation, And Denying Habeas Corpus Petition, *Riley v. Payne*, U.S.D.C. Western District of Washington Cause No. C02-5108RJB	30a
Report And Recommendation, *Riley v. Payne*, U.S.D.C. Western District of Washington Cause No. C02-5108RJB	32a
Order Denying Motion To Modify, *In re the Personal Restraint Petition of Johnny Lee Riley, Jr.*, Washington State Supreme Court Cause No. 71461-4	55a
Ruling Denying Review, *In re the Personal Restraint Petition of Johnny Lee Riley, Jr.*, Washington State Supreme Court Cause No. 71461-4	56a

Order Dismissing Petition, *In re the Personal Restraint Petition of Johnny Lee Riley, Jr.*, Washington State Court of Appeals Cause No. 26062-0-II.....64a

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY LEE RILEY ,JR.,)	No. 03-35054
Petitioner-Appellant,)	DC. No. CV-02-05108-RJB
v.)	OPINION
ALICE PAYNE,)	
Respondent-Appellee.)	

Appeal from the United States District Court for the Western District of Washington

Robert J. Bryan, District Judge, Presiding

Argued and Submitted

October 10, 2003 – Seattle, Washington

Filed December 23, 2003

Before: Stephen S. Trott, Raymond C. Fisher, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Gould

SUMMARY

Criminal Law and Procedure/Right to Counsel

The court of appeals reversed a judgment of the district court. The court held that counsel's unexplained failure to interview a witness who would have said that a shooting victim in anger had

threatened to shoot the defendant, corroborating the defendant's testimony that he was not the first aggressor and drew his gun in response to a threat, can constitute ineffective assistance of counsel when counsel called only the defendant as a defense witness at trial.

After being convicted in Washington state court of assault and of carrying a short firearm, and failing to prevail on his direct appeals and his personal restraint petition in state court, appellant Johnny Lee Riley brought a federal habeas corpus petition pursuant to 28 U.S.C. § 2254, mainly asserting that he received ineffective assistance of counsel at his Washington state court trial. Riley claimed that he was denied effective assistance of counsel because his lawyer did not interview a key witness, Edward Pettis, and introduce his testimony at trial, which might have corroborated Riley's testimony that Gustavo Jaramillo threatened to shoot him, and that Riley had shot in self defense. Riley's evidence was that Pettis was with him on the day of the shooting, and that Pettis would have testified about Jarmillo's [sic] threat to shoot Riley, as set forth in Pettis's declaration. Riley's lawyer did not follow up with Pettis after Riley told counsel Pettis had been with him when the dispute erupted. At the close of trial, the jury was instructed that Riley could not claim self-defense if the jury found Riley to be the first aggressor. The Washington State Supreme Court had denied review, thereby affirming the ruling and reasoning of its Commissioner, who had rejected Riley's ineffective assistance of counsel claim, finding that Riley failed to show that there was no legitimate tactical reason not to pursue Pettis as a witness, and considering

Pettis's potential testimony to be inconsequential. The district court also rejected Riley's claims.

Riley appealed.

[1] Under the Sixth Amendment to the United States Constitution, criminal defendants are guaranteed the right to effective assistance of counsel. To establish that he was deprived of effective assistance of counsel, Riley had to establish that his lawyer's performance fell below an objective standard of reasonableness, and that his lawyer's defective performance actually prejudiced him. [2] The Ninth Circuit has held that a lawyer who fails adequately to investigate, and to introduce into evidence, evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance. Where (as here) a lawyer does not put a witness on the stand, his decision will be entitled to less deference than if he interviews the witness. [3] Riley's lawyer's performance fell below an objective standard of reasonableness because he failed to interview Pettis. And the record did not disclose any reason for the failure of counsel to contact Pettis. Thus, the rule of requiring reasonable professional judgments before limiting investigation was offended here. [4] Counsel should reasonably have considered whether Pettis could effectively testify that in a verbal confrontation before the shooting, Jaramillo had threatened Riley's life. Considering that he called only Riley as a defense witness at trial, his lawyer's failure even to interview Pettis as a possible defense witness was a significant omission. Riley's lawyer's failure to interview Pettis rendered his performance below an objective standard of reasonableness.

[5] To establish prejudice, Riley had to demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [6] Riley's sole defense at trial on the assault charge was that he shot Jaramillo in self-defense. Riley's version of the facts was supported solely by his own testimony. [7] Whether Riley could be believed by the jury was dramatically affected by whether the jury found that Jaramillo had first threatened Riley before Riley pulled his gun. [8] In this sense, Pettis was a critical witness to lend credibility to Riley's story of threat by Jaramillo and response by Riley. Without any corroborating witnesses, Riley's bare testimony left him without any effective defense. [9] The importance of Pettis's testimony was underscored by the first aggressor jury instruction. Pettis's knowledge went directly to whether Riley was the first aggressor. [10] It had to be concluded that there was a reasonable probability that, but for Riley's lawyer's failure to interview or call Pettis, the verdict would have been different. Counsel's unexplained failure to interview a witness who would have said that the victim in anger threatened to shoot Riley undermined confidence in the jury verdict rejecting Riley's plea of self-defense. It had to be concluded that, under governing standards as established by the United States Supreme Court, Riley was prejudiced by his lawyer's omission.

[11] It had to be concluded that the state court's determination was an unreasonable application of the federal law because it was objectively unreasonable. To fairly present the

theory of self-defense to the jury, a reasonably effective defense counsel with Riley's interests in mind should have been alert to and interested in having Pettis testify to back up Riley's story of threat. A reasonably effective defense counsel should have at least interviewed Pettis to confirm that Riley's statement about Pettis's knowledge was true and to make an informed judgment about whether Pettis's testimony would help Riley's claim of self-defense. Because Riley's counsel did not interview or call a key witness who would have corroborated Riley's testimony that Riley was not the first aggressor and drew his gun in response to a threat, confidence in the verdict was undermined, and we are left with the firm conviction that Riley did not get a fair shake from the legal system. The judgment of the district court had to be reversed.

COUNSEL

David B. Zuckerman, Seattle, Washington, for the petitioner-appellant.

John J. Samson, Assistant Attorney General, State of Washington, for the respondent-appellee.

OPINION

GOULD, Circuit Judge:

Petitioner Johnny Lee Riley, Jr. appeals the district court's denial of his petition for a writ of habeas corpus, which was filed on March 6, 2002 in the United States District Court for the Western District of Washington. Riley was convicted in Washington state court of assault and of carrying a short firearm. His direct appeals and his personal

restraint petition in Washington state court were to no avail. In his federal habeas corpus petition pursuant to 28 U.S.C. § 2254, Riley asserted that he received ineffective assistance of counsel at his Washington state court trial; that the prosecutor engaged in misconduct that denied him his right to a fair trial; and that an accumulation of errors violated his right to due process. The district court rejected Riley's claims. Riley appealed. We have jurisdiction under 28 U.S.C. § 2253 and reverse the judgment of the district court.

I[1]

On June 16, 1994, Riley saw Gustavo Jaramillo and Aaron Calloway drive up in a car to an apartment complex where Riley was visiting a friend. Riley was informed that the car used by Jaramillo and Calloway was for sale. Thinking that his father might want the car, Riley approached Jaramillo and Calloway to express interest in purchasing it. After a conversation with Jaramillo and Calloway, Riley left to find his father, but was unsuccessful. At this point, the parties' accounts diverge.

Riley testified: Riley and an associate, Edward Pettis, returned to talk about the car. Riley asked if Jaramillo and Calloway were in a gang. Jaramillo said they were. Riley, in an ill-starred jest, called Jaramillo a "wanna-be." Jaramillo told Riley he "didn't know who he was f___ing with." Riley responded "yeah, right." Jaramillo then threatened

---

[1] We generally recite the facts as established in the state court proceedings and the rulings of the Washington State Supreme Court.

to shoot Riley.[2] In response Riley drew his gun, pointed it at Jaramillo and told Jaramillo to give up his gun. Jaramillo denied that he had a gun, but Riley said he could see a gun in Jaramillo's pants pocket. Jaramillo replied that his gun was in some bushes across the street and that there were police officers across the street. Riley thought these were efforts to distract him. Jaramillo reached for his gun. Riley shot Jaramillo in self-defense and ran.

Calloway testified: In the second meeting, Riley and his associate confronted Calloway and Jaramillo at gunpoint and demanded Jaramillo's gun. Riley attempted to take the gun from Jaramillo. The other man held Calloway down and took his pager. Riley then shot Jaramillo and took his gun.

Jaramillo testified: He arrived at the scene in a stolen car and was armed with a 9-millimeter handgun. Jaramillo said that Riley demanded his gun, but Jaramillo did not remember whether he made any threatening movements after Riley demanded the weapon.

Riley's associate, Pettis, was not called as a witness and did not testify.

Riley was charged with first degree assault, two counts of first degree robbery, and unlawful possession of a short firearm.[3]

---

[2] According to Riley's brief, Riley testified at trial that Jaramillo told Riley that he was going to "bust a cap in Riley's ass." This colorful characterization was not challenged by the government, and the state court opinions treated it as a threat to shoot Riley, if Riley's testimony was believed.

[3] Before trial, the court granted Riley's motion to sever the firearm count. The parties stipulated to submitting the firearm

Trial commenced in Pierce County Superior Court in the State of Washington on November 7, 1994. Riley was represented by attorney Gary Clower. The jury convicted Riley of assault but acquitted him of robbery. On January 11, 1995 Riley was sentenced to a term of imprisonment of 300 months.

Riley filed a direct appeal to the Washington Court of Appeals, asserting that the trial court's "first aggressor" instruction was given in error, that prosecutorial misconduct denied Riley a fair trial, and that the trial court erred in imposing an exceptional sentence. The Washington Court of Appeals rejected these claims on May 21, 1997. On direct appeal to the Washington State Supreme Court, Riley presented only the question of whether the "first aggressor" instruction violated his First Amendment rights. The Washington State Supreme Court on May 13, 1999 held that there was no error.

In another bid for freedom, Riley returned to the Washington Court of Appeals by filing a personal restraint petition, alleging claims of ineffective assistance of counsel and prosecutorial misconduct. The Washington Court of Appeals on August 3, 2001 rejected Riley's ineffective assistance of counsel claims on the merits and held that his prosecutorial misconduct claims were procedurally barred by Washington's "relitigation rule."[4] The Commissioner

---

charge to the judge based on the evidence introduced at trial, and Riley was found guilty of that offense.

[4] Washington's "religitation rule" prohibits relitigation of issues already presented on direct appeal. *In re Taylor*, 717 P.2d 755, 758 (Wash. 1986). *See also Pirtle v. Morgan*, 313 F.3d 1160, 1165 (9th Cir. 2002).

of the Washington State Supreme Court affirmed, and the Washington State Supreme Court then, on October 25, 2001, denied Riley's motion to modify the Commissioner's ruling.

Riley commenced this federal habeas action in the district court on March 6, 2002. On October 17, 2002, the magistrate judge issued a report and recommendation suggesting that Riley's petition be dismissed with prejudice. The district court adopted the magistrate judge's report and recommendation, and denied the petition on December 6, 2002. This appeal followed.

II

Riley's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA's constrained review permits a federal court to grant habeas relief affecting a state prisoner only when a state court's ruling:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court's decision is "contrary to" federal law if it: (1) "applies a rule that contradicts the governing law" set forth in Supreme Court case authority, or (2) applies controlling law to a set of

facts that is "materially indistinguishable" from a Supreme Court decision but nevertheless reaches a different result. *Lockyer v. Andrade,* 123 S.Ct. [sic] 1166, 1173 (2003). A state court's decision is an "unreasonable application" of federal law only if it is "objectively unreasonable," which "requires the state court decision to be more than incorrect or erroneous." *Id.* at 1174.

We review a district court's decision to deny a 28 U.S.C. § 2254 habeas petition *de novo. Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). The district court's factual findings relevant to its determination are reviewed for clear error. *Gandarela v. Johnson*, 286 F.3d 1080, 1085 (9th Cir. 2002).

III

Riley claims that he was denied effective assistance of counsel because his lawyer Clower did not interview a key witness, Edward Pettis, and introduce his testimony at trial, and because Clower did not object when the prosecutor made improper closing argument.

[1] Under the Sixth Amendment to the United States Constitution, criminal defendants are guaranteed the right to effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 685 (1984). To establish that Riley was deprived of effective assistance of counsel, *Strickland*'s familiar test requires that Riley establish that Clower's performance fell below an objective standard of reasonableness, and that Clower's defective performance actually prejudiced him. *Id.* at 688.

Riley submitted evidence to the district court that Clower never contacted Edward Pettis to

interview him about the case. The record contains no evidence to explain this omission or the fact that Pettis was not called as a witness on Riley's behalf, even though Pettis might have corroborated Riley's testimony that Jaramillo threatened to shoot him. Pettis filed a declaration in Riley's personal restraint proceedings, which was in the record before the district court, stating how Pettis would have testified, if called to testify. Pettis said:

> Johnny [Riley] went up to [Calloway and Jaramillo] to talk about the car. The guys looked and acted like gang members. I remember one of them saying the name of his gang at some point. I'd never heard of it. The conversation was friendly until Johnny [Riley] said something about the guys being "wanna-bes." I remember those words clearly because everything changed as soon as he said that. Even though Johnny [Riley] was just joking around, the guys got real mad. They started threatening Johnny [Riley].
>
> When one of them said he was going to shoot Johnny [Riley], I ran away. I wouldn't have been afraid of these guys if they didn't have a gun because they were younger and smaller than me and Johnny [Riley]. But when one of them started talking about shooting, he sounded like he really meant it. I think he wanted to prove how tough he was because he thought Johnny [Riley] had insulted him. I didn't see what happened after that, but I heard a gun go off. Johnny [Riley] met up with me a couple of minutes later and said 'He tried to shoot me.'

. . .

> I was never contacted by Johnny [Riley's] lawyer or anybody working for him. If they had asked me, I would have told them the same thing I'm saying now. I would have been willing to testify in court if they wanted me to, and I would have told the truth.

The Respondent-Appellee has not challenged or contradicted Riley's evidence that Pettis was with him on the day of the shooting, and that Pettis would have testified about a threat to shoot Riley, as set forth in Pettis's declaration. And so we must consider *Strickland*'s two-part test, assessing the objective reasonableness of counsel's performance and assessing prejudice, as applied to the facts that Pettis says would have been his testimony had he been called as a witness by Riley's counsel.

A

[2] Under *Strickland*, we first determine whether Clower's performance fell below an "objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. We have held that "a lawyer who fails adequately to investigate, and to introduce into evidence, evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002) (quoting *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999)); *see also Lord v. Wood*, 184 F.3d 1083, 1096 (9th Cir. 1999) (counsel's performance was deficient where

counsel failed to interview three witnesses who had material evidence as to their client's innocence). Of course, counsel need not interview every possible witness to have performed proficiently. *LaGrand v. Stewart*, 133 F.3d 1253, 1274 (9th Cir. 1998) (concluding there was no prejudice where trial counsel had personally interviewed the one eyewitness and read investigative reports and transcripts of interviews with all other witnesses). "However, where (as here) a lawyer does not put a witness on the stand, his decision will be entitled to less deference than if he interviews the witness. The reason for this is simple: A lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor-factors we are not in a position to second-guess." *Lord*, 184 F.3d at 1095 n.8 (parenthetical in original).

[3] Clower's performance fell below an "objective standard of reasonableness" because he failed to interview Pettis. Having never spoken with Pettis, Clower could not have fully assessed Pettis's version of the events, Pettis's credibility and demeanor, or any other aspect of his involvement that might have reinforced Riley's defense. *Strickland* held that "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-91. Although counsel here made some investigation (he met with his client Riley at least), counsel did not follow up with Pettis after Riley told counsel Pettis had been with him when the dispute with Jaramillo and Calloway erupted. And the record does not disclose any reason for the failure of counsel to contact Pettis. Thus, the rule of

Strickland requiring "reasonable professional judgments" before limiting investigation is offended here. The government has provided no testimony of counsel as to why he did not contact Pettis. Having never interviewed Pettis, Clower could not have determined what Pettis would have said about the shooting, whether Pettis would have been a credible defense witness, and whether Pettis should have been called to testify to aid the defense. The record shows that counsel did not make a reasonable professional judgment to ignore an important corroborating witness.

[4] Riley's story was that he acted in self-defense after being threatened with deadly force by Jaramillo. Under Riley's version of the facts, Pettis was present when Jaramillo's verbal threat was made. Counsel should reasonably have considered whether Pettis could effectively testify that in a verbal confrontation before the shooting Jaramillo had threatened Riley's life. Clower unmistakably did not conduct a reasonable investigation that rendered Pettis's testimony, much less an interview, unnecessary. It should have appeared to a reasonable defense counsel that Pettis's testimony might bolster Riley's tale of self-defense. Considering that Clower called only Riley as a defense witness at trial, Clower's failure even to interview Pettis as a possible defense witness was a significant omission. Clower's failure to interview Pettis rendered his performance below an objective standard of reasonableness.

B

[5] Under *Strickland*, we next evaluate whether Clower's failure to interview Pettis prejudiced Riley. To establish prejudice, Riley must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

[6] Riley's sole defense at trial on the assault charge was that he shot Jaramillo in self-defense. The events that took place when Riley and Pettis approached Jaramillo and Calloway the second time were important. Riley said that he and Pettis came back in peace to negotiate about buying the car. Jaramillo and Calloway both said that Riley came upon them with Riley's gun drawn to rob them. Riley's version was supported solely by his own testimony.

The magistrate judge's report and recommendation, adopted by the district court, reasoned that not calling Pettis could not have mattered because Pettis said that he had run away before the fateful shooting. Stated another way, when Pettis heard Jaramillo threaten to shoot Riley, Pettis ran to avoid threatened danger. It is true that Pettis could not testify whether Riley, with his gun pointed at Jaramillo, saw Jaramillo move as if to go for his gun, leading to a legitimate self-defense shooting. That tale was told, and could only be told, by Riley. But Riley may have been defeated in the jury's mind before that point was even reached.

[7] Riley and the prosecutor were in a race for the hearts and minds of the jury. If the jury thought that Riley had gone after Jaramillo and Calloway with gun drawn to rob them before the shooting, Riley would lose the race to convince the jury without getting out of the starting blocks. Yet if the jury thought that Riley pulled his gun only in response to Jaramillo's threat to shoot Riley, then Riley's pointing a gun at Jaramillo might be understandable as a defensive action,[5] and the jury would have to

---

[5] Under Washington law, if properly instructed, a jury might have considered that Riley was entitled to draw his gun in response to the verbal threat on his life from Jaramillo if Riley reasonably believed he was in danger of being shot *State v. Walden*, 932 P.2d 1237, 1239 (Wash. 1997) (en banc) ("[t]he degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant."); *see also State v. Theroff*, 622 P.2d 1240, 1244 (Wash. 1980) ("[a] person's right to use force is dependent upon what a reasonably cautious and prudent person in similar circumstances would have done and whether he reasonably believed he was in danger of bodily harm. Actual danger need not be present."). However, the verbal threat *alone* would not have justified Riley shooting Jaramillo. This conclusion is consistent with the Washington State Supreme Court's opinion in Riley's direct appeal. *State v. Riley*, 976 P.2d 624, 628 (Wash. 1999). In rejecting Riley's direct appeal, the Washington State Supreme Court held that "the giving of an [first] aggressor instruction where words alone are the asserted provocation would be error . . . ." *Id.* at 629. In discussing its holding, the court observed that "a 'victim' faced with only words is not entitled to respond with force," and that

> [f]or the victim's use of force to be lawful, the victim must reasonably believe he or she was in danger of imminent harm. However, mere words alone do not give rise to reasonable apprehension of great bodily harm. If applied in a case like this one, a rule that words alone preclude the speaker from claiming self-defense could

decide if Riley's further story about Jaramillo's movement for his gun had a ring of truth. Whether Riley could be believed by the jury was dramatically affected by whether the jury found that Jaramillo had first threatened Riley before Riley pulled his gun.

[8] In this sense, Pettis was a critical witness to lend credibility to Riley's story of threat by Jaramillo and response by Riley. Pettis's testimony would have been " 'consistent with [Riley's] account' and would have created more equilibrium in the evidence presented to the jury." *Luna v. Cambra*, 306 F.3d 954, 961 (9th Cir. 2002), *amended*, 311 F.3d 928 (quoting *Brown v. Myers*, 137 F.3d 1154, 1157 (9th Cir. 1998)). Here, as in *Brown*, "without any corroborating witnesses, [Riley's] bare testimony left him without any effective defense." *Brown*, 137 F.3d at 1158; *see also Anderson v. Johnson*, 338 F.3d 382, 394 (5th Cir. 2003) (counsel's failure to call a witness who was one of only two adults to observe the alleged

---

lead to the conclusion that insults about a gang affiliation justify a violent response.

Id. at 628-29. The court thus expressed its rationale that a "victim" of words is not permitted to respond with violence based on the words alone. *Id.* at 629 ("such a rule [where a speaker could be a "first aggressor" based on words alone] would effectively permit *violence* by a 'victim' of mere words . . .") (emphasis added).

Riley's version was that Jaramillo made a genuine threat to shoot Riley. Therefore, Riley was justified in drawing his gun (but not shooting) as a defensive measure in response to Jaramillo's threat to shoot him. However, Riley would not have been justified in using violent force (in the form of shooting Jaramillo) based on Jaramillo's threat alone. The self-defense justification of the shooting requires a jury to believe Riley's story that Jaramillo made a sudden movement for his gun.

crime prejudiced the petitioner because the witness's testimony "would have been a powerful rebuttal to that of the victim and her minor daughter"). Pettis's testimony was important to support Riley's version of the events, and may have led to a different verdict, but was not considered by Riley's counsel Clower who did not contact Pettis or call him as a witness, after Riley alerted Clower to Pettis's knowledge.[6]

[9] The importance of Pettis's testimony is underscored by the "first aggressor" jury instruction. At the close of trial, the jury was instructed that Riley could not claim self-defense if the jury found Riley to be the "first aggressor."[7] Under the prosecution's evidence based on testimony of Jaramillo and Calloway, Riley was the "first aggressor." Under Riley's testimony, uncorroborated because Pettis was not also called to testify, Riley approached to talk about the car, was not the "first aggressor," and drew his gun in self-defense when Jaramillo threatened him. If so, Riley would have

---

[6] The record contains no statement from Clower regarding why he did not call Pettis. But it does contain evidence of Riley's advice to Clower about Pettis's presence when the verbal threat was made by Jaramillo, and evidence of Pettis's statement that he was never contacted by Clower but if called would have testified that Jaramillo threatened Riley when angered by Riley's characterization of Jaramillo as a "wanna be."

[7] This instruction stated:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

been eligible to invoke self-defense. Pettis's knowledge went directly to whether Riley was the "first aggressor." *See State v. Callahan*, 943 P.2d 676, 680-81 (Wash. Ct. App. 1997) (holding that where defendant pulled his gun because he was "outnumbered [by three men] and fearing for his safety," the evidence tended to show that defendant's fear "was objectively reasonable, the force used was no greater than necessary, and he was not the first aggressor").

It is regrettable that we live in such a violent world that some may forfeit life or health to a perception of disrespect and a resulting violent response. But in this context, a jury could conclude that it would be reasonable for a person whose life was credibly threatened by a young gang member, to draw a gun first for protection. The jury could disbelieve that story, but it would have been more effectively presented if Pettis had been invited to testify at trial. Similarly, the jury could disbelieve that Riley, with gun pointed at Jaramillo, was thereafter threatened sufficiently to justify Riley's use of deadly force. How the stage was set in the jury's mind might have spelled the difference between a verdict of guilt, or instead a trial conclusion of "not guilty" because of reasonable doubt.

[10] We conclude that there is a reasonable probability that, but for Clower's failure to interview or call Pettis, the verdict would have been different. Counsel's unexplained failure to interview a witness who would have said that the victim in anger threatened to shoot Riley undermines our confidence in the jury verdict rejecting Riley's plea of self-defense. We conclude that, under governing

standards as established by the United States Supreme Court, Riley was prejudiced by Clower's omission.[8]

IV

Because of AEDPA's constrained standards of review, we must proceed further in analysis. The Washington State Supreme Court denied review, thereby affirming the ruling and reasoning of its Commissioner, who had rejected Riley's ineffective assistance of counsel claim in these terms:

> Mr. Riley fails to show that there was no legitimate tactical reason not to pursue Pettis as a witness. Pettis had a criminal record, and he might well have been implicated as an accomplice in Mr. Riley's crimes. And as Pettis admits, he initially misled the police about his knowledge of the incident. Under the circumstances, counsel could have legitimately decided to concentrate on attacking the credibility of Jaramillo and Calloway, who had criminal backgrounds. Moreover, according to

---

[8] Our determination is bolstered by an analysis of the strength of the government's case. We have previously held that our evaluation of *Strickland* prejudice must be considered in light of the strength of the government's case. *Luna v. Cambra*, 306 F.3d 954, 966 (9th Cir. 2002), *amended*, 311 F.3d 928, citing *Strickland*, 466 U.S. at 696 ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). In this case, the trial was essentially a credibility contest between Riley on the one hand, and Calloway and Jaramillo on the other. The record does not indicate that anyone else testified in support of the prosecution's theory of the case on this crucial issue (i.e. that Riley approached Jaramillo and Calloway for the second time with a drawn gun, intending to rob them).

> his declaration, Pettis would have verified only that someone threatened to shoot Mr. Riley. He evidently did not know whether Jaramillo or Calloway actually had a gun, and he was not a witness to the critical events which ensued. I therefore agree with the Chief Judge [of the Washington State Court of Appeals] that there is no reasonable probability that Pettis's testimony would have changed the outcome.

This determination focused on Pettis's credibility as a potential defense witness and the events to which he could have testified, if called.

It appears that the Commissioner's reasoning rejects both deficiency by Clower and prejudice from failure to interview or call Pettis as a witness. The standard identified by the Commissioner was that Riley had to show "counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different." The Commissioner cited a Washington case, *State v. McFarland*, 899 P.2d 1251 (Wash. 1995), for the standard under which he was reviewing the claim of ineffective assistance of counsel and that case suggested that Washington courts applied the "2-prong test in *Strickland*." Thus, it appears that the Washington court decision was purporting to apply *Strickland*'s test. In this sense, we decline to say that the state court decision was "contrary to" the law that the Supreme Court of the United States established in *Strickland*, but we also must assess whether the Commissioner's decision "involved an unreasonable application of clearly established Federal law, as determined by the

Supreme Court of the United States" in *Strickland*. 28 U.S.C. § 2254(d). Further, to the extent the decision rests on factual grounds, we review only if the decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.*

We see no unreasonable factual determination in the Commissioner's opinion, which rests on what Pettis said in his declaration: when first asked by police about the shooting, Pettis said: "I told them I didn't know anything. I didn't want to cooperate because I had a probation warrant out. Also, I didn't really like to talk with the police because I didn't trust them." Thus, the Commissioner's statement that "as Pettis admits, he initially misled the police about his knowledge of the incident" is technically correct.

But the question before us is whether the state court's application of *Strickland* was "unreasonable." The Supreme Court's precedent says that we cannot lightly so conclude, but can only determine that there has been an "unreasonable application" of federal law if the state court decision is "objectively unreasonable" which means something more than merely "incorrect or erroneous." *Lockyer v. Andrade*, 123 S.Ct [sic] 1166, 1173-74 (2003). This standard is properly deferential because of the important role that state courts play in applying federal constitutional guarantees and because of federalism concerns that are evoked when we assess whether a state court system holds a state prisoner in violation of the federal constitution.

Even under the narrow constraint of our review under AEDPA and the Supreme Court's

precedent, we conclude here that there was an unreasonable application of *Strickland* an application "objectively unreasonable" that we believe would be soundly decried by any reasonable defense counsel. We are left with the unmistakable conclusion that the Washington State Supreme Court, through its Commissioner, did not properly address the impact of Clower's failure to interview Pettis or call him as a witness. Most striking is the obvious impact that Pettis's testimony could have had on the jury's determination of whether Riley was the "first aggressor." The defense in this case was premised on the factual theory that Jaramillo had threatened Riley's life before Riley drew his gun. Otherwise, Riley was the first aggressor and self-defense could not be found by the jury.

Although we have emphasized the value that Pettis's testimony would have had on the issue of whether Riley was the "first aggressor," there is also significance in Pettis's potential testimony on Riley's self-defense argument regarding the actual shooting. On this issue, Pettis said in his declaration that if called he would have testified: "Johnny [Riley] met up with me a couple of minutes later [after the shooting] and said 'He [Jaramillo] tried to shoot me.' " If admissible, such a statement by Pettis would directly corroborate Riley's trial testimony that he thought Jaramillo moved for the gun before Riley shot. Although such testimony by Pettis would have constituted hearsay, in our view it is probable that the testimony would have been admitted under the "excited utterance" exception to the Washington evidence rule generally barring admission of hearsay. Wash. R. Evid. 803(a)(2); *State v. Hardy*, 946 P.2d 1175, 1181 (Wash. 1997) (en banc) (stating

that under Washington law, "[e]xcited utterances are spontaneous statements made while under the influence of external physical shock before the declarant has time to calm down enough to make a calculated statement based on self-interest."). *See also State v. Strauss*, 832 P.2d 78, 86 (Wash. 1992) (affirming trial court's admission of victim's statement regarding sexual assault made over three hours after assault under the excited utterance exception); *Hardy*, 946 P.2d at 1182 (holding that victims' statements made "minutes" after robbery were admissible under excited utterance exception).

To us, this is yet another example of how Clower's failure to interview Pettis resulted in actual prejudice to Riley. Clower never interviewed Pettis, so Clower could not have evaluated Pettis's potentially helpful testimony for use in Riley's defense. The Commissioner of the Washington State Supreme Court incorrectly considered Pettis's potential testimony to be inconsequential. But the Commissioner's analysis not only ignored the significance of Pettis's potential testimony about Jaramillo's verbal threat precipitating the initial confrontation, but also that Pettis could testify Riley told Pettis minutes after the shooting that Jaramillo's movement to his gun provoked Riley's shooting. This was also an unreasonable application of *Strickland*.

The state court's reasoning also speculated that counsel might have had some "tactical reason not to pursue Pettis as a witness," and noted that Pettis had a criminal record, might have been implicated as an accomplice to Riley and misled police about his knowledge of the incident. Notwithstanding whether such concerns might have

justified counsel bypassing the possible use of Pettis as a witness after interviewing him, the record is undisputed that counsel did not contact Pettis, so counsel cannot be presumed to have made an informed tactical decision. Those accusing Riley were gang members. It would have been reasonable for his defense counsel to defend him not only with his own bare testimony but also with that of Pettis who was with him when the alleged threat was made, and who heard Riley's excited comment a few minutes after the shooting.[9]

Further, it was not objectively reasonable for the state court to reject Riley's claim based on the undisputed premise that Pettis did not know for sure if Jaramillo or Calloway had a gun and did not see the final critical events that followed Pettis's flight. The relevant testimony of Pettis, as we have explained, was that Jaramillo had threatened Riley's life and that shortly after the shooting, Riley told Pettis that Jaramillo had tried to shoot Riley. This testimony, if credited by the jury, would have made

---

[9] That Pettis initially did not volunteer information to the police and said he "didn't know anything," may be understandable given Pettis's record of prior encounters with law enforcement resulting in a criminal record and probation. Those facts do not contradict Pettis's declaration testimony that, if called as a witness by Riley's counsel, Pettis would have testified to what he said was the truth, including that Jaramillo threatened Riley's life, and did so in a way sufficiently alarming that Pettis fled. Pettis's description of the threat in his declaration was as follows: "The conversation was friendly until Johnny [Riley] said something about the guys being 'wanna-bes.' I remember those words clearly because everything changed as soon as he said that. Even though Johnny [Riley] was just joking around, the guys got real mad. They started threatening Johnny [Riley]. When one of them said he was going to shoot Johnny [Riley], I ran away."

Riley's story more believable and acceptable as a tale of self-defense. The Washington Court of Appeals acknowledged that Pettis might "have corroborated Riley's assertion that he was threatened," but that court, with all respect, failed to attach sufficient significance to the importance of material, corroborating evidence in this case.

The Washington State Supreme Court, through its Commissioner, committed the same error. This was a cast of characters and witnesses of such a nature that corroboration most certainly would have been of critical value to the jury, even from an associate who originally told a different story to the police. The government can be expected routinely to call such cooperating accomplice witnesses in the government's cases in chief (even if these witnesses may have offered a different story before trial) to corroborate the government's version of the events. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381, 1406-08, 1425-27 (1996). Also, juries can be expected to be keenly interested in whether witnesses should be believed, and here in whether Riley should have been believed when he said Jaramillo threatened him and when Riley said Jaramillo had tried to shoot him. In this sense the use of Pettis as a corroborating witness for Riley might have been all important to corroborate critical parts of Riley's version of the events.

[11] We conclude that the state court's determination was an unreasonable application of the federal law required by *Strickland* because it was objectively unreasonable. To fairly present the theory of self-defense to the jury, we conclude that a reasonably effective defense counsel with Riley's

interests in mind should have been alert to and interested in having Pettis testify to back up Riley's story of threat, in the trial that boiled down to the conflicting stories of Riley and Pettis, on the one hand, and Jaramillo and Calloway, on the other. A reasonably effective defense counsel should have at least interviewed Pettis to confirm that Riley's statement about Pettis's knowledge was true and to make an informed judgment about whether Pettis's testimony would help Riley's claim of self-defense. Because Riley's counsel did not interview or call a key witness who would have corroborated Riley's testimony that Riley was not the first aggressor and drew his gun in response to a threat, a key witness who himself fled from the threat, fearful of violence, our confidence in the verdict is undermined, and we are left with the firm conviction that Riley did not get a fair shake from the legal system.

We reverse the judgment of the district court.[10] On remand, the district court shall enter judgment granting a conditional writ of habeas corpus directing that Riley be released from custody unless the State of Washington begins trial proceedings against Riley within a reasonable time as set by the district court.

REVERSED AND REMANDED.

---

[10] Because we grant relief to Riley on his ineffective assistance of counsel claim, we do not reach the balance of the claims that are contained in Riley's petition.

FILED

JAN. 30, 2004

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHNNY LEE RILEY, JR.,	)	No. 03-35054
	)	
Petitioner-Appellant,	)	D.C. No.
	)	CV-02-05108-RJB
v.	)	
	)	ORDER
ALICEY PAYNE,	)	
	)	
Respondent-Appellee	)	

Before: TROTT, FISHER, and GOULD, Circuit Judges

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellee's Petition for Rehearing En Banc is also DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JOHNNY LEE RILEY, JR.,	)	Case Number:
	)	C02-5108RJB
	)	
Petitioner,	)	JUDGMENT IN A
v.	)	CIVIL CASE
	)	
ALICE PAYNE,	)	
Respondent.	)	

_____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

The Report and Recommendation is ADOPTED and the Petitioner's Petition for Writ of Habeas Corpus is DISMISSED.

December 6, 2002

BRUCE RIFKIN
Clerk

/s/Dara L. Kaleel
By Dara L. Kaleel,
Deputy Clerk

FILED

DECEMBER 6, 2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHNNY LEE RILEY, JR.,	Case No. C02-5108RJB
Petitioner,	ORDER ADOPTING
v.	REPORT AND
	RECOMMENDATION,
ALICE PAYNE,	AND DENYING
	HABEAS CORPUS
Respondent.	PETITION

This matter comes before the court on Mr. Johnny Lee Riley, Jr.'s Petition for Writ of Habeas Corpus (Dkt. #1). The court has considered the Petition, Respondent's Answer and Memorandum of Authorities (Dkt. #7), Petitioner's Response to Respondent's Answer (Dkt. #10), Reply to Petitioner's Response to Answer (Dkt. #12), the Report and Recommendation of the Honorable John L. Weinberg (Dkt. #15), Petitioner's Objections to Report and Recommendation (Dkt. #16), and the file herein.

Petitioner seeks federal habeas relief under 28 U.S.C. § 2254 from a 300-month sentence, resulting from his 1995 Pierce County convictions for first degree assault and unlawful possession of a firearm. After reviewing the record, the Magistrate Judge concluded that "no evidentiary hearing is required,

and that the Court should deny petitioner's § 2254 petition and dismiss this action with prejudice." Report, p. 1 (Dkt. #15).

Having carefully reviewed respondent's answer to the petition and petitioner's objections to the Report and Recommendation in light of controlling case law, the court finds that the Report and Recommendation should be adopted and the habeas corpus petition dismissed. The court extends its appreciation to counsel for petitioner and respondent for the thoroughness and clarity of their pleadings.

Therefore, it is hereby

ORDERED that the Report and Recommendation of the Honorable John L. Weinberg (Dkt. #15) is **ADOPTED**, and Petitioner's Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus (Dkt. #1) is **DISMISSED**.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to the Honorable John L. Weinberg.

DATED this 6th day of December, 2002.

/s/ Robert J. Bryan
Robert J. Bryan
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHNNY LEE RILEY JR., Petitioner, v. ALICE PAYNE, Respondent.	))))))))	Case No. C02-5108RJB REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Johnny Lee Riley is a state prisoner currently incarcerated at the McNeil Island Corrections Center in Steilacoom, Washington. He seeks relief under 28 U.S.C. § 2254 from a 300-month sentence, resulting from his 1995 Pierce County Superior Court convictions on charges of assault in the first degree and unlawful possession of a short firearm. (Dkt. 1.) After careful consideration of the record, the Court concludes that no evidentiary hearing is required, and that the Court should deny petitioner's § 2254 petition and dismiss this action with prejudice.

FACTUAL AND PROCEDURAL HISTORY

The Supreme Court for the State of Washington summarized the facts related to petitioner's convictions as follows:

On June 16, 1994, Johnny Lee Riley shot 15-year-old Gustavo Jaramillo. Riley claims he shot in

self-defense. At the time of the shooting, Riley was 26 years old and was considerably larger than Jaramillo. On the day of the shooting, Jaramillo was with his fried Aaron Calloway. Jaramillo and Calloway stole cars and sold drugs together, and on that day had used cocaine. Jaramillo also had a stolen car and a stolen 9 mm semiautomatic pistol in his possession.

Riley, who was visiting a friend, first saw Jaramillo in an alley, and asked about purchasing the car. Jaramillo and Calloway testified that Riley also wanted to buy the pistol. According to Riley, he left to tell his father about the car, but was unable to find him. He returned a short time later with another man. At the time, Jaramillo and Calloway were lying on a nearby lawn waiting for friends.

Conflicting testimony was given as to what occurred after Riley returned. Riley testified that he had asked Jaramillo about Jaramillo's gang, made some comments, and suggested that Jaramillo was only a "wanna-be." Verbatim Report of Proceedings (RP) at 28 (Nov. 10, 1994). He testified he did not intend any insult and instead said it jokingly. Jaramillo, though, was insulted, and said he was going to shoot Riley. Riley then pulled a gun on Jaramillo and demanded Jaramillo's gun so that Jaramillo would not shoot him in the back as he left. Jaramillo said he did not have a gun, that it was across the street in some bushes, which Riley did not believe. Riley also said that Jaramillo tried to distract him by claiming that the police were coming. Riley testified that Jaramillo was reaching for his gun when Riley shot him. Riley claimed he shot Jaramillo to keep him from shooting.

Other witnesses, including Calloway, testified that Riley approached, pulled out his gun and stood over Jaramillo while demanding to know where the 9 mm pistol was. Jaramillo's hands were by his head, as he had propped himself up on his right elbow, and the gun was in his right pants pocket, beneath him as he lay on his side on the ground. Riley ordered Jaramillo and Calloway not to move, and when Jaramillo looked up Riley shot him in the back of the neck, took Jaramillo's gun, and left.

Although conflicting evidence as to events was presented, there is no dispute that Riley pulled a gun on Jaramillo first.

Riley was charged with two counts of robbery, one count of assault in the first degree, and one count of unlawful possession of a firearm.

The issue at trial was whether Riley shot Jaramillo in self-defense, as he claimed. The trial court gave the jury several instructions on self-defense, and also gave an aggressor instruction. Clerk's Papers (CP) at 112 (Jury Instruction 15). Riley objected to the aggressor instruction, claiming that there was insufficient evidence to warrant giving it.

The jury found Riley guilty of assault in the first degree. Pursuant to the parties' agreement, the firearms charge was severed, and the trial judge found Riley guilty on that charge. The court sentenced Riley to a 300-month exceptional sentence.

Riley appealed, arguing that the giving the aggressor instruction was error, that prosecutorial misconduct denied him a fair trial, and the trial court erred in imposing an exceptional sentence. Riley's convictions and sentence were affirmed in a

Court of Appeals' Commissioner's ruling on the court's own motion on the merits. *See* RAP 18.14. Although Riley argued, among other things, that the giving of the aggressor instruction denied him First Amendment rights, the argument was not addressed because it was raised for the first time on appeal and the Commissioner ruled that Riley had not shown a manifest error affecting a constitutional right. The Court of Appeals denied Riley's motion to modify the ruling.

Riley then sought discretionary review by this court, arguing only that the giving of the aggressor instruction was error.

State v. Riley, 976 P.2d 624, 626-28 (Wash. 1999). Petitioner, through counsel, argued to the state Supreme Court that the giving of the aggressor instruction was error in that it denied petitioner's ability to argue his theory of the case, and that it denied petitioner his First Amendment right to free speech. (Dkt. 8, Exh. 7 at 1.) The Court disagreed, and affirmed petitioner's judgment and sentence on May 13, 1999. *Riley*, 976 P.2d 624. The Court issued its mandate on June 9, 1999. (Dkt. 8, Exh. 9.)

On June 9, 2000, petitioner filed a personal restraint petition ("PRP"), through counsel, in the Court of Appeals for the State of Washington. (*Id.*, Exh. 10.) The PRP raised claims of prosecutorial conduct and ineffective assistance of counsel. (*Id.*, Exh. 12.) The Court of Appeals dismissed the petition, believing that petitioner was attempting to re-litigate an issue previously raised on appeal and decided on the merits, and finding that petitioner had failed to show that his restraint was unlawful. (*Id.* At 2 and 7-8.) Petitioner then sought review of

the Court of Appeals' decision in the Supreme Court for the State of Washington. (*Id.*, Exh. 13). Petitioner raised the following eight claims for review:

1) Was Mr. Riley denied effective assistance of counsel at trial because his attorney

   a) failed to interview or subpoena witness Edward Pettis?

   b) failed to object to some of the prosecutor's improper argument?

2) Was Mr. Riley entitled to a reference hearing on his claim of ineffective assistance of counsel at trial?

3) Did the prosecutor violate Mr. Riley's rights to free speech and due process when he urged the jury to conclude that Riley was the first aggressor based on Riley's words alone?

4) Did the Chief Judge err in holding that issue number 3 could not be relitigated because the same "ground" was decided on direct appeal?

5) Was Mr. Riley denied effective assistance of counsel on appeal because his appellate lawyer failed to raise issue number 3, above?

6) Did the prosecutor violate Mr. Riley's right to due process, and right to be free from self-incrimination, by:

   a) bringing up that it was illegal for him to carry a gun, after the Court had severed the counts so as to prevent the jury from hearing such information?

b) asking Mr. Riley to comment on the truthfulness of other witnesses?

c) claiming that defense counsel was making improper arguments?

d) telling the jury that it should use its own standard of what force was reasonable, rather than an objective standard?

e) pointing out that Riley had not told his side of the incident to law enforcement prior to testifying in court?

7) Did cumulative error violate Riley's right to due process?

8) May the Chief Judge dismiss a personal restraint petition ("PRP"), without referring it to the full Court, when it has not found, and could not find, the PRP to be frivolous?

(Dkt. 8, Exh. 13 at 1-2.)

The Commissioner of the Supreme Court for the State of Washington denied review, agreeing with the Court of Appeals' finding that there was "no reasonable probability that Pettis's testimony would have changed the outcome" of petitioner's trial and that petitioner was procedurally barred from raising a First Amendment violation, and holding that the Chief Judge had properly dismissed petitioner's PRP. (Dkt. 8, Exh. 14 at 3-6.) Petitioner moved to modify the Commissioner's ruling. (*Id.*, Exh. 15.) On January 8, 2002, the Supreme Court for the State of Washington denied the motion to modify. (*Id.*, Exh. 16.)

On March 6, 2002, petitioner filed in this Court, through counsel, his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Dkt. 1.) On May 7, 2002, respondent filed an answer to the petition. (Dkt. 7.) Petitioner then filed a response to respondent's answer (Dkt. 10), and respondent filed a reply to petitioner's response. (Dkt. 12.) On September 27, 2002, because petitioner raises a claim of prosecutorial misconduct, respondent filed petitioner's trial transcripts, pursuant to this Court's order. (Dkt. 14.) The briefing is now complete and the petition is ripe for review.

GROUNDS FOR REVIEW

Petitioner presents the following five grounds for review in his federal habeas petition:

> **Ground One**: Mr. Riley was denied effective assistance of counsel at trial.
>
> **Ground Two**: The "first aggressor" instructor was so vague that it permitted the jury to deny Mr. Riley his right to self-defense based solely on his constitutionally-protected speech. This violated Riley's right to free speech under the First Amendment. In the alternative, if the instruction clearly applied only to unprotected conduct, then the prosecutor's closing argument flagrantly misstated the law, and deprived Riley of his rights to due process and free speech.
>
> **Ground Three**: In addition to the argument discussed above, the prosecutor violated Mr. Riley's rights to due process and freedom from self-incrimination by: a) questioning Riley about his illegal possession of a firearm,

despite the trial court's ruling severing the firearm count because it was unfairly prejudicial as to the other counts; b) asking Riley to comment on whether other witnesses were lying; c) questioning Riley, in violation of his Fifth Amendment right to be free from self-incrimination, about whether he was revealing his story to the State for the first time on the witness stand; d) in closing argument, telling the jury that defense counsel's argument was improper and misstating the standards for self-defense.

Ground Four: If the court finds that appellate counsel failed to argue that the prosecutor's closing argument violated Riley's First Amendment rights, then Riley was denied effective assistance of counsel on appeal.

Ground Five: The accumulation of errors in this case violated Mr. Riley's right to due process.

(Dkt. 1, Attachment at 2-5.)

DISCUSSION

Standard of Review

A habeas corpus petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts

in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d).

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the U.S. Supreme Court on a question of law, or if the state court decides a case differently than the U.S. Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* The Ninth Circuit has interpreted "an unreasonable application of law" to mean an application that is "clearly erroneous." *Van Tran v. Lindsey*, 212 F.3d 1143, 1152-54 (9th Cir.), *cert. denied*, 531 U.S. 944 (2000).

In addition, if a habeas petitioner challenges the determination of a factual issue by a state court, such determination shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Exhaustion and Procedural Bar

It is well established that state remedies must first be exhausted on all issues raised in a federal habeas corpus petition. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b), (c). Respondent concedes that petitioner properly exhausted Claims 1, 4, and 5 by fully and fairly presenting them to the Supreme Court for the State of Washington as federal claims and, thus, habeas review is appropriate. (*See* Dkt. 7

at 6); *see also Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) (discussing the exhaustion doctrine). Respondent also concedes that the first part of Claim 2 has been properly exhausted, but argues that petitioner did not fully present the second part of Claim 2 to the Supreme Court for the State of Washington. (*Id.*) Finally, respondent also argues that petitioner failed to exhaust Claim 3, and that it is procedurally barred under Washington law. (*Id.*) The Court agrees with respondent.

Petitioner presented the second part of Claim 2 and Claim 3 in his PRP, which was found by the state courts to be procedurally barred, and dismissed on that basis. (Dkt. 8, Exhs. 12 and 14.) Petitioner argues that no part of Claim 2 is procedurally barred because it was exhausted on direct appeal, so it is irrelevant whether the claim was properly raised in the PRP. (Dkt. 10 at 19.) Petitioner further argues, that the same issue was raised before the Supreme Court for the State of Washington on direct appeal, but was, at most, phrased differently. (*Id.*) The Court disagrees.

On direct appeal, petitioner asked the Supreme Court to review the issue of whether "the giving of the instruction under the facts of this case den[ied] petitioner his First Amendment rights." (Dkt. 8, Exh. 7 at 1.) Petitioner then argued that the instruction, along with the prosecutor's closing arguments, violated his constitutional rights. (Dkt. 8, Exh. 7 at 6-7.) Petitioner did not specifically raise the issue of whether the prosecutor's argument "flagrantly misstated the law," as he raises now in the habeas petition; instead he argued that the instruction was constitutionally vague. (*Id.* at 9-12.) Therefore, the Court agrees with respondent that the

second part of Claim 2 was not exhausted, and that the Supreme Court for the State of Washington "'clearly and expressly' state[d] that its judgment rest[ed] on a state procedural rule." *Harris v. Reed*, 489 U.S. 255, 264 (1989) (quotation omitted). The Supreme Court Commissioner stated, "I agree with the Chief Judge that Mr. Riley is procedurally barred from raising this issue." (Dkt. 8, Exh. 14 at 4.) Thus, the claim falls within the rule of procedural bar, and cannot be addressed on the merits by this Court absent a showing of cause and prejudice.

When a state prisoner defaults on his federal claims in state court by failing to properly present them, "federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In order to satisfy the "cause" prong of the cause and prejudice requirement, the petitioner must show that some objective factor external to the defense prevented him from complying with the state's procedural rule. *Coleman*, 501 U.S. at 752 (citing *Murray v. Carrier*, 477 U.S. 478, 487 (1986)). To show "prejudice," the petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original). Only in an extraordinary case may the habeas court grant the writ on such a claim without a showing of cause and prejudice. *Murray*, 477 U.S.

at 495-96. Petitioner has shown neither cause nor prejudice; therefore, the second part of Claim 2 must be considered as exhausted but foreclosed from habeas review.

As for Claim 3, petitioner argues that the same reasons for allowing the second part of Claim 2 should also allow him to raise the issues under Claim 3. Respondent argues that these claims were not presented to the Supreme Court for the State of Washington on direct appeal, and therefore, the Court of Appeals was precluded from considering them in the PRP. (Dkt. 7 at 11.) The Court of Appeals, in dismissing petitioner's PRP, did not address all of the issues petitioner raised in his PRP, and now raised in his habeas petition under Claim 3. Instead, the appeals court determined that all of petitioner's prosecutorial misconduct claims were procedurally barred "absent a showing that the ends of justice would be served." (Dkt. 8, Exh. 12 at 2.) The Court of Appeals only specifically discussed petitioner's claims that the aggressor instruction violated his First Amendment Rights and that his trial counsel was ineffective for failing to interview and present Edward Pettis as a witness in petitioner's favor. (*Id.* at 2-8.)

Respondent argues that the Court of Appeals properly dismissed all of petitioner's prosecutorial misconduct claims because "a personal restraint petitioner may not renew an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of that issue." *In re Personal Restraint Petition of Lord*, 868 P.2d 835, 842 (Wash. 1994((citing *In re Taylor*, 717 P.2d 755, 758 (Wash. 1986)). (Dkt. 7 at 12.) Petitioner argues that his claims were improperly dismissed, relying

on *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990), for the premise that "*Taylor* only bars issues which have been 'heard and determined' by the reviewing court." (Dkt. 10 at 20.) Petitioner then argues that the Supreme Court for the State of Washington, on a petition for review, agreed that the Court of Appeals had properly applied *Taylor*, but did not hold that *Taylor* barred the Supreme Court from considering the claim. (*Id.* at 21.) Finally, petitioner argues that *Taylor* is not independent of the federal question or adequate to support the judgment, and therefore, cannot preclude petitioner from raising the claim now. (Dkt. 10 at 21.) Respondent asserts that *Taylor* is an independent and adequate state law, sufficient to bar review of the claims, as clarified by recent decisions of the U.S. Supreme Court and the Ninth Circuit. (Dkt. 12 at 3-7.)

The Court agrees with respondent. Again, the claim falls within the rule of procedural bar, and cannot be addressed on the merits by this Court absent a showing of cause and prejudice. The Court finds that petitioner has shown neither cause nor prejudice, therefore, Claim 3 must be considered as exhausted but foreclosed from habeas review. Thus, this Court will review only Claims 1, 4 and 5, and the first part of Claim 2.

Claim 1 – Ineffective Assistance of Counsel at Trial

Petitioner first argues that he was denied effective assistance of counsel at trial. (Dkt. 1, Attachment at 3.) Petitioner bases this claim on the fact that counsel failed to call Edward Pettis, who was with petitioner during the incident in question but ran away before the shooting occurred, as a

witness, and because counsel failed to object when the prosecutor argued that the jury should find petitioner to be the first aggressor based on his words alone. (*Id.*) Respondent argues that the state courts reasonable denied these claims because they applied the *Strickland* test, *infra*, and found that petitioner did not meet either prong. (Dkt. 7 at 15-18.)

In order to succeed with a claim of ineffective assistance of counsel, petitioner must meet a two-part test, proving that: 1) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and 2) the deficient performance so prejudiced the defense that it deprived the petitioner of the right to a fair trial. *Stickland v. Washington*, 466 U.S. 668, 686-87 (1984). There is a strong presumption that counsel's performance fell within the wide range of reasonable assistance. *Id.* at 689. To prevail on his habeas petition, however, petitioner must demonstrate not just that the *Strickland* standard for ineffective assistance of counsel was met, but also that the state courts' adjudication of his constitutional claims "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1).

Regarding counsel's failure to call Edward Pettis as a witness, petitioner argues that counsel was ineffective because he failed to conduct adequate pretrial investigation. (Dkt. 10 at 7.) The Court of Appeals for the State of Washington rejected petitioner's argument stating:

> If Pettis had been called as a defense witness and testified consistent with his declaration, his testimony would only have corroborated Riley's assertion that he was threatened. Because Pettis ran away on hearing the threats, he was not present during the crucial moments immediately before Riley shot Jaramillo. On these facts, Pettis's corroboration is insufficient to show that, if trial counsel had interviewed Pettis and called him as a defense witness, there is a reasonable probability the verdict would have been different. Thus, Riley does not satisfy the *Strickland* prejudice prong.

(Dkt. 8, Exh. 12 at 7.)

Petitioner argues that the Court of Appeals failed to recognize that Pettis's testimony went to the central issue at trial – whether petitioner was justified in initially drawing his gun and pointing it at Jaramillo. (Dkt. 10 at 10.) Petitioner's argument, however, is flawed in that it misstates the issue. Whether petitioner was justified in drawing his gun was not the issue; rather, the issue was whether petitioner could rely on a claim of self-defense for actually shooting Jaramillo. While Pettis certainly could have testified to the events that occurred before he ran away, which led up to the shooting, e.g., that Jaramillo threatened petitioner, he could not have testified as to whether Jaramillo attempted to reach for his gun, whether petitioner truly believed he was about to be shot, or whether petitioner could have simply walked or run away as Pettis did. (*See* Dkt. 8, Exh. 10, Declaration of Edward Pettis.)

In affirming the Court of Appeals' decision, the Supreme Court for the State of Washington added:

> Mr. Riley fails to show that there was no legitimate tactical reason not to pursue Pettis as a witness. Pettis had a criminal record, and he might well have been implicated as an accomplice in Mr. Riley's crimes. And as Pettis admits, he initially misled the police about his knowledge of the incident. Under the circumstances, counsel could have legitimately decided to concentrate on attacking the credibility of Jaramillo and Calloway, who themselves had criminal backgrounds. Moreover, according to his declaration, Pettis would have verified only that someone threatened to shoot Mr. Riley. He evidently did not know whether Jaramillo or Calloway actually had a gun, and he was not a witness to the critical events which ensured. I therefore agree with the Chief Judge that there is not reasonable probability that Pettis' testimony would have changed the outcome.

(Dkt. 8, Exh. 14 at 3.)

The Court finds that the state courts reasonably determined that petitioner failed to meet the *Strickland* test. At trial, both parties conceded that Riley was the first shooter. The state courts reasoned, and this Court agrees, that because Pettis ran away before the shooting occurred, he could have only verified that petitioner was threatened. He had not way of knowing, other than by petitioner's statements after the fact, whether petitioner provoked the victim and caused the necessity to use

self-defense. Therefore, petitioner's argument that counsel did not adequately conduct pretrial investigation, thereby denying petitioner of effective assistance, fails.

Petitioner also claims that he was denied effective assistance at trial because trial counsel failed to object when the prosecutor told the jury that they could find petitioner was the first aggressor based on his words alone. (Dkt. 10 at 8.) In denying this claim, the Court of Appeals for the State of Washington stated:

> Riley asserts that trial counsel was ineffective by failing to object to the prosecutor's closing argument on First Amendment grounds. Even assuming the prosecutor improperly infringed on his free speech rights by urging the jury to rely solely on Riley's comments, and further assuming that counsel was deficient by not objecting to the prosecutor's argument on this basis, Riley does not satisfy the prejudice prong of the *Strickland* test, i.e., but for counsel's omission, there is a reasonable probability that the outcome of the trial would have been different. As the Supreme Court held, there was sufficient evidence to support the giving of the aggressor instruction and this instruction did not turn on the protected or unprotected nature of Riley's speech. 137 Wn.2d at 913-14. Given that there was evidence of Riley's aggressive conduct to support the aggressor instruction, and that the instruction did not refer to verbal provocation but instead required the jury to find that his "acts and conduct" provoked the fight (*Riley*, 137 Wn.2d

> at 913-14), any impropriety in the prosecutor's closing argument was not so prejudicial as to deny Riley's due process right to a fair trial. Consequently, Riley fails to [show] the prejudicial effect from the alleged counsel deficiency by not objecting to the prosecutor's argument on First Amendment grounds.

(Dkt. 8, Exh. 12 at 4.)

The Court again finds that the state courts reasonably determined that petitioner failed to meet the *Strickland* test. Although the prosecutor emphasized petitioner's aggressive words in his closing argument, the jurors also heard the Court's instruction directing them to determine whether petitioner was a first aggressor based on his conduct. The Court presumes that jurors follow the instructions they are given by the Court. *Penry v. Johnson*, 532 U.S. 782, 799 (2001); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *Strickland*, 466 U.S. at 694; *Payton v. Woodford*, 299 F.3d 815, 827 (9th Cir. 2002). The jury heard evidence pertaining to both words and conduct, indeed, the Supreme Court for the State of Washington determined that "there was evidence of aggressive conduct on Riley's part." *Riley*, 976 P.2d at 629. The Supreme Court further found, and the Court of Appeals agreed, that:

> The issue whether the victim is sufficiently provoked to use force, thereby denying the defendant the right to self-defense, does not turn on the protected or unprotected nature of defendant's speech, nor does the pattern jury instruction prohibit or penalize protected speech.

Riley, 976 P.2d at 630. Based on this analysis, petitioner fails to demonstrate that trial counsel's failure to object to the prosecutor's statements on First Amendment grounds was so deficient that it fell below a standard of reasonableness.

Claim 2 – First Aggressor Instruction

Petitioner argues second that the "first aggressor" instruction given at trial was so vague that it permitted the jury to deny petitioner his right to self-defense based solely on his constitutionally-protected speech, thereby violating his right to free speech under the First Amendment. (Dkt. 1, Attachment at 3.) Respondent asserts that, although the First Amendment protects speech, the U.S. Supreme Court has never held that the First Amendment prohibits a state court from giving an aggressor instruction based upon protected speech. (Dkt. 7 at 20.) Respondent further argues that even if the First Amendment did prohibit an aggressor instruction based solely on protected speech, petitioner's claims fail because the instruction prevented a claim of self-defense based upon petitioner's conduct. (Dkt. 7 at 20-21.) Petitioner responds that the instruction was over broad, allowing the prosecutor to argue that petitioner was the first aggressor based on his words alone, and therefore included protected speech. (Dkt. 10 at 13.) As already determined, the Court rejects the argument that the prosecutor violated petitioner's First Amendment rights.

At the end of petitioner's trial, the Pierce County Superior Court instructed the jury that:

> No person may, by any intentional act reasonably likely to provoke a belligerent

> response, create a necessity for acting in self defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's *acts and conduct* provoked or commenced the fight, then self-defense is not available as a defense.

Riley, 976 P.3d at 627 (citing Clerk's papers at 112, Jury Instructions) (emphasis added). Petitioner argues that the jury should have been told the word "acts" as used in the instruction excludes speech. (Dkt. 10 at 13.)

In reviewing this claim, the Supreme Court for the State of Washington first noted that:

> Riley's argument regarding his First Amendment claim fails to explain . . . how the giving of the aggressor instruction ran afoul of the First Amendment. He fails to cite any authority which truly supports his argument that his First Amendment rights have been abridged. Instead, cases he relies upon involve defendants' claims of prosecution for speech. *E.g., State v. Talley*, 122 Wn.2d 192, 858 P.2d 217 (1993) (prosecution under "hate crimes" statute). As the Court of Appeals reasoned, Riley has failed to identify manifest error affecting a constitutional right. . . .

Riley, 976 P.2d at 628.

While the Supreme Court for the State of Washington then held that words alone would not support an aggressor instruction under Washington law, *id.* at 628, the Court also found that:

> The instruction does not refer to verbal provocation. Thus, the issue whether the victim is sufficiently provoked to use force, thereby denying the defendant the right to self-defense, does not turn on the protected or unprotected nature of defendant's speech, nor does the pattern jury instruction prohibit or penalize protected speech. It directs the jury to decide whether the defendant's act has precipitated a confrontation with the victim.

Riley, 976 P.2d at 630.

As stated earlier, the Court presumes that the jury follows Court instructions. This instruction did not provide that petitioner's words alone would make him a "first aggressor." Therefore, the state courts reasonably denied petitioner's claim. Furthermore, the state courts' decisions are not contrary to or an unreasonable application of clearly established federal law. Thus, petitioner's claim for relief fails.

Claim 4 – Ineffective Assistance of Appellate Counsel

Petitioner next argues that if the Court finds that his appellate counsel failed to argue that the prosecutor's closing arguments violated petitioner's First Amendment rights, he was denied effective assistance of counsel. (Dkt. 1, Attachment at 5 and Dkt. 10 at 26.) Apparently, petitioner believes that respondent does not consider this claim to have been exhausted. (Dkt. 10 at 26.) Respondent, however, concedes that this claim was exhausted, arguing that the state courts reasonably rejected this claim because the failure to raise a potentially meritorious claim does not amount to ineffective assistance. (Dkt. 7 at 6 and 9.) Therefore, petitioner's

subsequent ineffective assistance argument need not be addressed.

Petitioner has only argued that the Court should find this claim to nave been fully exhausted in the state courts, and the parties agree that it has been. It is unclear whether petitioner argues anything else in regard to appellate counsel's performance, other than to reiterate that the state courts erred in determining that the prosecutor's closing arguments were not prejudicial. (*See* Dkt. 1, Attachment at 5.) For the reasons stated above under Claims 2 and 4, the Court finds that the state courts reasonably denied this claim.

Claim 5 – Cumulative Error

Petitioner's final ground on appeal is that the accumulation of errors in this case violated petitioner's right to due process of law. (*Id.* and Dkt. 10 at 26-27.) In support of this contention, petitioner cites to two U.S. Supreme Court cases and one Ninth Circuit case. (*See* Dkt. 10 at 27.) Respondent argues that petitioner has failed to show his cumulative error claim is based on clearly established federal law. (Dkt. 12 at 8.) Petitioner responds that petitioner "must show only that his underlying constitutional claims are based on clearly established U.S. Supreme Court law. Cumulative error . . . is not in itself a ground for relief, but merely a process used by the federal courts to evaluate the prejudice from several underlying constitutional violations." (Dkt. 10 at 27.) Because the Court has found that the state courts did not err in their decisions on any of the grounds raised in the instant petition, and because petitioner fails to present any clearly established federal law supporting his cumulative

error contention, the Court hereby rejects his argument.

CONCLUSION

For the reasons set forth above, I recommend petitioner's claims for federal habeas relief be denied and that this action be dismissed with prejudice. A proposed order accompanies this Report and Recommendation.

DATED this 15th day of October, 2002.

/s/ John L. Weinberg
JOHN L. WEINBERG
United States Magistrate Judge

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of	)	**ORDER**
	)	No. 71461-4
JOHNNY LEE RILEY, JR., Petitioner.	)	C/A No. 26062-0-II

Department I of the Court considered this matter at its January 8, 2002, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That Petitioner's Motion to Modify Commissioner's Ruling is denied.

DATED at Olympia, Washington this 8th day of January, 2002.

/s/ Gerry L. Alexander
CHIEF JUSTICE

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of	)	
	)	NO. 71461-4
JOHNNY LEE RILEY, JR.	)	
	)	RULING DENYING
Petitioner.	)	REVIEW

Johnny Lee Riley was charged with robbery, first-degree assault, and unlawful possession of a firearm in connection with the shooting of 15-year-old Gustavo Jaramillo. At trial, Mr. Riley claimed self-defense. Over his objection, the trial court gave the jury an aggressor instruction. The jury found Mr. Riley guilty of first-degree assault.[1] Division Two of the Court of Appeals affirmed the conviction and sentence. On review, this court affirmed the Court of Appeals. *State v. Riley*, 137 Wn.2d 904, 976 P.2d 624 (1999). The court held that an aggressor instruction may not be given if words alone constitute the asserted provocation, but that the instruction was proper in this case because it referred only to conduct and acts, and there was evidence that Mr. Riley provoked the confrontation by his conduct. *Id.* at 910-14. Mr. Riley subsequently filed a personal restraint petition in Division Two, which the Chief Judge dismissed. Mr. Riley now seeks this court's discretionary review of the Chief Judge's order. RAP 16.14(c); RAP 13.5

[1] By agreement, the unlawful possession charge was severed, and the trial court found Riley guilty of that charge.

Mr. Riley's conviction stems from an incident that occurred on June 16, 1994. That day, Gustavo Jaramillo was with his friend, Aaron Calloway, in possession of a stolen car and a stolen pistol. Mr. Riley saw Jaramillo in an alley and asked about buying the car. He left and returned later with a friend, Edward Pettis. At the time, Jaramillo and Calloway were lying on a nearby lawn. According to Mr. Riley, he asked Jaramillo about his gang affiliation and suggested he was only a "wanna-be." Although Mr. Riley meant the remark as a joke, Jaramillo took it as an insult and said he was going to shoot Mr. Riley. Mr. Riley then pulled his own gun and demanded Jaramillo's gun so he would not be shot in the back when he left. Jaramillo told Mr. Riley he did not have a gun and directed his attention across the street to some bushes. Jaramillo also purportedly tried to distract Mr. Riley's attention by saying that the police were coming. At that point, according to Mr. Riley, Jaramillo reached for his gun, so Mr. Riley shot him.

According to other witnesses, however, Mr. Riley approached, pulled out his gun, and stood over Jaramillo demanding to know where his gun was. Jaramillo's pistol was in his right pants pocket at the time, beneath him as he lay on his side. Mr. Riley ordered Jaramillo and Calloway not to move, and when Jaramillo looked up, Mr. Riley shot him in the back of the neck and took his gun.

Mr. Riley first argues that his trial counsel was ineffective in failing to interview Pettis as a potential witness. According to Pettis's declaration, he was with Mr. Riley at the time of the incident. He said that Mr. Riley's conversation with Jaramillo was friendly until Mr. Riley referred to Jaramillo

and Calloway as "wanna-bes." According to Pettis, Jaramillo and Calloway became angry, and one of them threatened to shoot Mr. Riley. Pettis felt that whoever mentioned shooting Mr. Riley sounded serious, so at that point, he ran away. When he later met up with Mr. Riley again, Mr. Riley purportedly told him that Jaramillo tried to shoot him. Pettis admits that, when the police contacted him the next day, he told them he knew nothing because he was on probation and did not want to cooperate.

To support his claim of ineffective assistance, Mr. Riley must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Because there is a strong presumption that counsel's representation was effective, Mr. Riley must show there were no legitimate strategic or tactical reasons for counsel's challenged conduct. *Id.* at 355. Mr. Riley fails to show that there was no legitimate tactical reason not to pursue Pettis as a witness. Pettis had a criminal record, and he might well have been implicated as an accomplice in Mr. Riley's crimes. And as Pettis admits, he initially misled the police about his knowledge of the incident. Under the circumstances, counsel could have legitimately decided to concentrate on attacking the credibility of Jaramillo and Calloway, who themselves had criminal backgrounds. Moreover, according to his declaration, Pettis would have verified only that someone threatened to shoot Mr. Riley. He evidently did not know whether Jaramillo or Calloway actually had a gun, and he was not a witness to the critical events

which ensued. I therefore agree with the Chief Judge that there is no reasonable probability that Pettis's testimony would have changed the outcome.

Mr. Riley next contends that the prosecutor committed misconduct during closing argument when he told the jurors that they could find that Mr. Riley was the aggressor based on his words alone. He relies on the following portion of the argument:

> Instruction Number 15 [the aggressor instruction] tells you what perhaps may be the most important instruction for your purpose in this case. The defendant cannot be the aggressor. He can't start the fight and decide now I'm going to finish it. He cannot create the necessity for self-defense.
>
> What I would suggest to you is that, if you look at what the defendant said and how he said it in this case, that you will find there is no self-defense.
>
> Even if you ignore our evidence, ignore Gus [Jaramillo], ignore Aaron [Calloway], ignore everybody else and everything else, even if you just sit and listen to what the defendant said and how he said it, you will determine he is the aggressor. . . .
>
> The defendant admits he insulted Gus and Aaron. And when they became insulted and Gus said, "you don't know who you're 'F'ing with," I asked the defendant, "Why don't you leave?" And his answer-and I don't remember the exact wording-but it was something along the lines of "Nobody talks to me that way."

> mean, that was the gist of it. That was the tone of it. And again, I don't remember the exact words. I wasn't taking notes, but that was the tone of if [sic]. Nobody talks to Johnny Riley that way. Johnny Riley is a big man, and he carries a gun, and nobody talks to him that way. . . .
>
> He pokes his finger in Gus's eye, according to his testimony-not our evidence-his testimony, and he gets sarcastic with him and says, "Yeah, right." And he knows Gus has a gun, and here he is poking at this guy, according to his testimony.

Motion for Discretionary Review at 14-15 (emphasis and footnotes omitted). Mr. Riley urges that this argument both misstated the law (by suggesting that words alone can make a defendant an aggressor under self-defense analysis) and violated his First Amendment free speech rights.

But I agree with the Chief Judge that Mr. Riley is procedurally barred from raising this issue. He made claims of prosecutorial misconduct on direct appeal (involving misconduct during both trial and closing argument), and the Court of Appeals rejected those claims on the merits. A claim rejected on its merits on direct appeal will not be considered in a subsequent personal restraint petition unless the petitioner shows that the interests of justice require the issue to be reexamined. *In re Jeffries*, 114 Wn.2d 485, 487, 789 P.2d 731 (1990). Such a showing can be made if there has been an intervening change in the law or some other justification for not raising a crucial point or argument on direct appeal. *In re Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999).

But Mr. Riley fails to show he was justified in not previously making the misconduct argument he now asserts. Indeed, on appeal, he made a similar First Amendment argument in connection with the trial court's aggressor instruction. Nothing precluded him from also making that point as regards the closing argument.

Mr. Riley argues, however, that because the particular instance of misconduct he now asserts was not raised on appeal, the rule precluding reconsideration of issue decided on appeal does not apply. But simply revising a previously rejected legal ground for relief, either by attempting to prove the same ground with different facts or by attempting to support the same ground with different legal arguments, does not create a "new" claim or ground for relief. *Jeffries*, 114 Wn.2d at 488. Mr. Riley argued on appeal that the prosecutor committed prejudicial misconduct. That is same ground he urges in his personal restraint petition, albeit on the basis of different facts. He does not show that the interests of justice require this ground to be reconsidered in a different factual context.

In any event, Mr. Riley does not persuade me that the prosecutor committed misconduct. It is evident from the argument that the prosecutor was not suggesting to the jury that it could find Mr. Riley the aggressor *solely* because of what he said to Jaramillo. The prosecutor focused on Mr. Riley's testimony and demeanor, emphasizing that when he asked Mr. Riley why he did not leave the scene when Jaramillo became belligerent, he responded that "Nobody talks to me that way." The prosecutor thus tried to persuade the jury that by his words and actions, Mr. Riley took an aggressive posture and

needlessly escalated the confrontation. It thus does not appear that the prosecutor misstated the law, nor does Mr. Riley demonstrate any First Amendment violation.[2] And even if the prosecutor committed misconduct, Mr. Riley fails to show that there is a substantial likelihood the prosecutor's argument affected the verdict. *See State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). The aggressor instruction made reference only to acts and conduct, and the jury was told that it should disregard any argument which was not supported by the evidence or the law as given by the court. The jury is presumed to have followed these instructions. *State v. Greiff*, 141 Wn.2d 910, 922-23, 10 P.3d 390 (2000).[3]

Finally, Mr. Riley asks the court to reexamine the instances of prosecutorial misconduct he urged on appeal. But he does not show that that [sic] interests of justice require reconsideration of those claims. *Jeffries*, 114 Wn.2d at 497.

---

[2] As in his appeal before this court, Mr. Riley does not adequately explain how reference to what he said during the incident violates First Amendment rights. *Riley*, 137 Wn.2d at 910.

[3] Since Mr. Riley fails to show prejudice, there is also no merit to his argument that trial counsel was ineffective in not objecting to the prosecutor's argument, or that appellate counsel was ineffective in not challenging the argument on direct appeal.

In sum, the Chief Judge properly dismissed the personal restraint petition. The motion for discretionary review is accordingly denied.

/s/Geoffrey Crooks
COMMISSIONER

October 25, 2001

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint Petition of	No. 26062-0-II
JOHNNY LEE RILEY, Petitioner.	ORDER DISMISSING PETITION

Johnny Lee Riley seeks relief from personal restraint imposed following his 1994 conviction of first degree assault for shooting 15-year-old Gustavo Jaramillo. His conviction was affirmed on appeal by this court and the Supreme Court. *State v. Riley*, 137 Wn.2d 904, 976 P.2d 624 (1999).[1] Petitioner contends that (1) the prosecutor violated his due process and First Amendment rights by arguing to the jury in closing statement that it could find Riley was the aggressor based on remarks he made to Jaramillo immediately before he shot him, and (2) he was denied effective assistance of counsel at trial and on appeal.

Prosecutorial Misconduct

A collateral attack of a criminal judgment and sentence should not simply reiterate the issues previously raised and resolved on direct review. *In re Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999).

[1] In a commissioner's ruling, this court affirmed the judgment and sentence. Ruling Affirming Judgment, No. 19147-4 (Wash. Ct. App. May 21, 1997) (Appendix B, State's Response to Personal Restraint Petition).

When a personal restraint petitioner seeks review of an issue rejected on its merits on appeal, the petitioner must show that reexamining the issue serves the ends of justice. *Gentry*, 137 Wn.2d at 388. This burden can be met by showing an intervening change in the law, or by raising new crucial points of fact or law that were not or could not have been raised on direct appeal. *Gentry*, 137 Wn.2d at 388-89; *see also In re Vandervlugt*, 120 Wn.2d 427, 432, 842 P.2d 950 (1992).

This court resolved Riley's claim of prosecutorial misconduct on appeal. Ruling Affirming Judgment, at 6-7. He could have, but did not, include the assertion that the prosecutor's closing argument violated his free speech rights. Instead, he included this First Amendment argument in his challenge to the aggressor instruction. This court and the Supreme Court rejected his claim that the evidence did not support the giving of an aggressor instruction. Ruling Affirming Judgment, at 3-4 and n.1; *Riley*, 137 Wn.2d at 910-11. The Supreme Court noted that "Riley's argument regarding his First Amendment claim fails to explain adequately his contention that he engaged in protected speech and fails to explain how the giving of the aggressor instruction ran afoul of the First Amendment." *Riley*, at 901.

This court will not reexamine the prosecutorial misconduct claim absent a showing that the ends of justice would be served. Riley asserts that the "ends of justice" warrants revisiting the issue of whether the prosecutor's closing

argument was constitutionally impermissible.[2] But he fails to make the requisite showing. He does not demonstrate any intervening material change in the

---

[2] In this petition, Riley contends the following portion of the prosecutor's argument infringed on his First Amendment rights:

> Instruction Number 15 [the aggressor instruction] tells you what perhaps may be the most important instruction for your purpose in this case. The defendant cannot be the aggressor. He can't start the fight and decide now I'm going to finish it. He cannot create the necessity for self-defense.
>
> What I would suggest to you is that, if you look at what the defendant said and how he said it in this case, that you will find there is no self-defense. Even if you ignore our evidence, ignore Gus, ignore Aaron, ignore everybody else and everything else, even if you just sit and listen to what the defendant said and how he said it, you will determine he is the aggressor. . . .
>
> The defendant admits he insulted Gus and Aaron. And when they become insulted and Gus said, "you don't know who you're "F"ing with," I asked the defendant, "Why don't you leave?" And his answer - - and I don't remember the exact wording - - but it was something along the lines of "Nobody talks to me that way."
>
> I mean, that was the gist of it. That was the tone of it. And again, I don't remember the exact words. I wasn't taking notes, but that was the tone of it. Nobody talks to Johnny Riley that way. Johnny Riley is a big man, and he carries a gun, and nobody talks to him that way.
> . . .
>
> He pokes his finger in Gus's eye, according to his testimony - - not our evidence - - his testimony, and he gets sarcastic with him and says, "Yeah right." And he knows Gus has a gun, and here he is poking at this guy, according to his testimony.

Personal Restraint Petition (PRP), at 14-15 (quoting Verbatim Record of Proceedings (RP) VI 34-36).

law or other good cause for relitigating this issue. The authorities he relies on for his First Amendment claim do not constitute an intervening material change in the law.

Further, Riley's attempt to relitigate this issue by way of an ineffective counsel claim is unpersuasive. To prevail on a claim of ineffective assistance of counsel, petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2nd 61, 77, 917 P.2d 563 (1996). Prejudice is established when there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Hendrickson*, 129 Wn. at 78. Because deficiency and resulting prejudice must be proved, a claim of counsel ineffectiveness may be resolved on a finding of lack of prejudice without determining whether counsel's performance was deficient. *State v. Lord*, 117 Wn.2d 829, 884, 822 P.2d 177 (1991).

Riley asserts that trial counsel was ineffective by failing to object to the prosecutor's closing argument on First Amendment grounds. Even assuming the prosecutor improperly infringed on his free speech rights by urging the jury to rely solely on Riley's comments, and further assuming that counsel was deficient by not objecting to the prosecutor's argument on this basis, Riley does not satisfy the prejudice prong of the *Strickland* test, i.e., but for counsel's omission, there is a reasonable probability that the outcome of the trial would have been different. As the Supreme Court held, there was

sufficient evidence to support the giving of the aggressor instruction and this instruction did not turn on the protected or unprotected nature of Riley's speech. 137 Wn.2d at 913-14. Given that there was evidence of Riley's aggressive conduct to support the aggressor instruction, and that the instruction did not refer to verbal provocation but instead required the jury to find that his "acts and conduct" provoked the fight (*Riley*, 137 Wn.2d at 913-14), any impropriety in the prosecutor's closing argument was not so prejudicial as to deny Riley's due process right to a fair trial. Consequently, Riley fails to the prejudicial effect from the alleged counsel deficiency by not objecting to the prosecutor's argument on First Amendment grounds.

Riley also complains that his appellate counsel was ineffective by not arguing on appeal that the prosecutor violated his First Amendment free speech rights in closing argument. Appellate counsel is not constitutionally obligated to raise every non-frivolous issue. *Jones v. Barnes*, 463 U. S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); *Gustave v. U.S.*, 627 F.2d 901, 906 (9th Cir. 1980). Here, where Riley's appellate counsel did make the First Amendment argument as part of the challenge to the aggressor instruction, it is hard to conceive how counsel's performance can be deficient. Riley does not show how reframing the argument as a prosecutorial misconduct claim would have made any difference to the resolution of the issue by this court or the Supreme Court. *See In re Personal Restraint of Maxwell*, 133 Wn.2d 322, 344, 945 P.2d 196 (1997). Thus, he fails to satisfy the *Strickland* prejudice prong, i.e., the outcome of his appeal would have been different if appellate counsel had raised the

First Amendment argument as part of the prosecutorial misconduct claim.

Effectiveness of Trial Counsel

Riley also alleges that trial counsel was ineffective by failing to interview Edward Pettis. He submits a declaration of Pettis to support this claim. Exhibit B, PRP. Pettis states that he was with Riley on July 16, 1994, the night Riley shot Jaramillo. Pettis was present for part of the encounter with Jaramillo and Calloway; he describes the incident:

> Johnny [Riley] pulled up to a spot near the McDonald's on Tacoma Avenue. There were two Hispanic teenage guys hanging out on the grass. Johnny went up to them to talk about the car. The guys looked and acted like gang members. I remember one of them saying the name of his gang at some point. I'd never heard of it. The conversation was friendly until Johnny said something about the guys being "wanna-bes." I remember those words clearly because everything changed as soon as he said that. Even though Johnny was just joking around, the guys got real mad. They started threatening Johnny. When one of them said he was going to shoot Johnny, I ran away. I wouldn't have been afraid of these guys if they didn't have a gun because they were younger and smaller than me and Johnny. But when one of them started talking about shooting, he sounded like he really meant it. I think he wanted to prove how tough he was because he though Johnny had insulted him.

> I didn't see what happened after that, but I heard a gun go off. Johnny met up with me a couple of minutes later and said, "He tried to shoot me."

Declaration of Edward Pettis (Exhibit B, Personal Restraint Petition).

Pettis's declaration is considered to determine the prejudicial effect of counsel's alleged omission, and in light of the evidence presented at Riley's trial and the applicable law as given to the jury.[3]

At trial, Riley admitted he shot Jaramillo but asserted he acted in self-defense. Self-defense contains the following elements: (1) At the time of the event, the defendant must subjectively believe that he or she is (a) in imminent danger of great personal injury and (b) responding with only that degree of force necessary to repel the danger; and (2) these subjective beliefs must be such that a reasonable person considering only the circumstances known to the defendant at the time would also have entertained them. *State v. Bergeson*, 64 Wn. App. 366, 370, 824 P.2d 515 (1992). Although actual danger need not be present, a defendant must show that aggressive or threatening behavior, gestures, or communication by the victim preceded the defendant's use of force in order to show that the defendant had reasonable grounds to believe there was imminent danger of great bodily harm. *State v. Theroff*, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980).

---

[3] This court considers Pettis's declaration in its entirety to evaluate Riley's petition. The State's "Motion to Strike Portion of Petitioner's Personal Restraint Petition and Appendices" is denied.

Riley's encounter with Jaramillo and Aaron Calloway began with a conversation about buying a car. Then Riley asked them about their gang affiliation and he called Jaramillo a "wanna-be." A heated exchanged followed. Jaramillo was armed but it was undisputed that Riley pulled out his gun first, aimed it at Jaramillo, and fired when Jaramillo disregarded Riley's command not to move. *Riley*, 137 Wn.2d at 906-07.

Pettis states in his declaration that he was with Riley until the threats to shoot Riley were made. Pettis ran away at that point. Thus, Pettis was not present during the events that followed. As a result, he could not corroborate Riley's account of the events after the threats were made.

Riley's version was: (1) he told Jaramillo not to move; (2) he walked around to stand behind Jaramillo; (3) he asked Jaramillo for his gun; (4) Jaramillo denied he had a gun; (5) Riley saw Jaramillo's gun hanging out of his pocket; (6) Jaramillo and Calloway said the police were coming; and (7) then Jaramillo made a movement toward his gun. RP IV 30-35 (Riley's Testimony). As reflected in defense counsel's closing argument, Riley's self-defense theory turned on the acts and comments following his demand for Jaramillo's gun. *See* RP VI 59-62.

If Pettis had been called as a defense witness and testified consistent with his declaration, his testimony would only have corroborated Riley's assertion that he was threatened. Because Pettis ran away on hearing the threats, he was not present during the crucial moments immediately before Riley shot Jaramillo. On these facts, Pettis's corroboration

is insufficient to show that, if trial counsel had interviewed Pettis and called him as a defense witness, there is a reasonable probability the verdict would have been different. Thus, Riley does not satisfy the *Strickland* prejudice prong.

Because the claim of prosecutorial misconduct was heard and determined on appeal, and absent a showing that relitigation of this issue serves the ends of justice, it will not be reexamined here. On Riley's claim of ineffective assistance of trial counsel by failing to interview and call Edward Pettis as a defense witness, there is no showing of prejudice resulting from the alleged counsel deficiency. Thus, Riley fails to show that his restraint is unlawful. Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 3 day of August, 2001.

/s/Armstrong, C.J.
Chief Judge

cc: Johnny Lee Riley
Pierce County Clerk
David B. Zuckerman
Kathleen Proctor
County Cause No. 94-1-02948-9

(3)

Supreme Court, U.S.
FILED
JUL 23 2004
OFFICE OF THE CLERK

NO. 03-1498

IN THE SUPREME COURT OF THE UNITED STATES

ALICE PAYNE,

Petitioner,

v.

JOHNNY LEE RILEY JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

CHRISTINE O. GREGOIRE
Attorney General
William Berggren Collins
Senior Assistant Attorney General
John J. Samson*
Assistant Attorney General
Paul D. Weisser
Senior Counsel
**Counsel of Record*
PO Box 40116
Olympia, WA 98504-0116
360-586-1445

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

1. The "Less Deference" Rule Is Unrelated To Whether Counsel Conducted A Thorough Investigation. 1

2. The Ninth Circuit Improperly Shifted The Burden To Petitioner To Prove Counsel Performed Competently..... 4

3. Summary Reversal Is Appropriate In This Case. 7

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Bell v. Cone,
535 U.S. 685 (2002) 3

Chandler v. United States,
218 F.3d 1305 (11th Cir. 2000) 6

Holland v. Jackson,
124 S. Ct. 2736 (2004) 7, 8

Massaro v. United States,
538 U.S. 500 (2003) 5

Strickland v. Washington,
466 U.S. 668 (1984) ..... passim

Waters v. Thomas,
46 F.3d 1506 (11th Cir. 1995) 6

Woodford v. Visciotti,
537 U.S. 19 (2002) 3, 7, 8

Yarborough v. Gentry,
124 S. Ct. 1 (2003) ..... passim

Other Authorities

Antiterrorism and Effective Death Penalty Act of 1996 6

INTRODUCTION

Riley concedes that the Ninth Circuit applied a "less deference" standard in reviewing defense counsel's decision not to personally interview and call a witness in Riley's state court criminal trial. Riley incorrectly argues this "less deference" standard is consistent with *Strickland v. Washington*, 466 U.S. 668 (1984) because the amount of deference accorded to counsel's decision should be based on the amount of investigation personally conducted by counsel. Because the Ninth Circuit failed to provide proper deference to both counsel's decision and the state court adjudication of Riley's claim of ineffective assistance of counsel, the Court should grant the petition for a writ of certiorari and summarily reverse the decision of the Ninth Circuit Court of Appeals.

ARGUMENT

1. The "Less Deference" Rule Is Unrelated To Whether Counsel Conducted A Thorough Investigation.

In the petition we explained that the Ninth Circuit's "less deference" rule conflicts with *Strickland v. Washington*, 466 U.S. 688 (1984) and decisions from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuit Courts of Appeal. Pet. 9-11. In *Strickland* and the other decisions, the claim was that counsel was ineffective because he or she failed to interview and call certain witnesses. All of the cases applied a heavy measure of deference to counsel's performance. No decision suggested that counsel's performance

was entitled to less deference because he or she did not personally interview a potential witness.

Riley claims that the decision below is consistent with *Strickland* because "strategic decisions will be given greater deference when made after a thorough investigation." Br. Opp. 8. But the Ninth Circuit's less deference rule has nothing to do with whether there was a thorough investigation. In this case counsel knew about Pettis and why he might be a helpful witness – Riley told him. Br. Opp. 9.[1] If counsel had taken an additional step and sent a well trained investigator to speak with Pettis, the Ninth Circuit would still apply its less deference rule because counsel did not personally interview Pettis before deciding not to call him. Thus, even in a case where counsel conducts a meticulous investigation – using a dozen well trained investigators – the Ninth Circuit would apply less deference to counsel's decision unless the lawyer personally spoke to every witness he or she decided not to call. Indeed, under the less deference rule, the more thorough the investigation – the less deference will be accorded to counsel's decision not to call a particular witness. If counsel has a dozen investigators talking to hundreds of potential witnesses, it would be virtually impossible for counsel to speak with every witness he or she decided not to call.

---

[1] Riley suggests that counsel in this case conducted no investigation. Br. Opp. 8. But this is plainly wrong. Riley concedes that he explained to his counsel "why Pettis would be a helpful witness". Br. Opp. 9. Riley also concedes that in *Strickland* the investigation was proper even though counsel "based his approach largely on the choices of and information provided by his client." Br. Opp. 7.

Riley also defends the Ninth Circuit's "less deference" standard by suggesting the application of the presumption of competence rests upon the extent of counsel's personal investigation. Br. Opp. 8 ("The 'less deference' statement was no different than saying that the court would have given counsel *more* deference had he interviewed Pettis and then decided he would not make a good witness."). Riley cites no authority to support his claim that the deference applied to counsel's performance is based on some sliding scale depending on the number of personal interviews counsel conducts.

Strickland and its progeny do not support Riley's position. On the contrary, the Court has repeatedly reminded the federal courts that any review of a claim of ineffective assistance of counsel must be highly deferential. *Strickland*, 466 U.S. at 689; *Yarborough v. Gentry*, 124 S. Ct. 1, 4-7 (2003) (*per curiam*); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). The review must be "doubly deferential when it is conducted through the lens of federal habeas." *Yarborough*, 124 S. Ct. at 4.

The highly deferential review required under *Strickland* is necessary to prevent second guessing by the federal courts. As the Court cautioned in *Strickland*, "a court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight." *Bell v. Cone*, 535 U.S. 685, 702 (2002). The difficulties inherent in evaluating counsel's representation require the strong presumption of competence. *Strickland*, 466 U.S. at 689.

In contrast to the deferential review required by *Strickland*, the purpose of the less deference rule is to permit the Ninth Circuit to second guess counsel's performance. Pet. App. 13a ("a lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor – *factors we are not in a position to second-guess*".) (emphasis added).

Riley argues that there is no conflict in the circuits because the petition "points to no court of appeals decision holding that it is improper to consider whether or not defense counsel interviewed a witness before declining to present him." Br. Opp. 8. Riley's claim misses the point. All of the other circuits apply a heavy measure of deference to counsel's decision not to interview and call a particular witness. Pet. 10-11. The Ninth Circuit does not. It applies less deference unless counsel personally interviews the witness he or she decided not to call to the stand.

2. The Ninth Circuit Improperly Shifted The Burden To Petitioner To Prove Counsel Performed Competently.

The Ninth Circuit compounded its erroneous evaluation of counsel's performance, as well as its review of the state court adjudication of Riley's claim, by placing the burden of proving competence upon the State, rather than placing the burden of proving incompetence on Riley. The Ninth Circuit stated, "the record does not disclose any reason for the failure of counsel to contact Pettis." Pet. App. 13a. "The government has provided no testimony of counsel as to why he did not contact Pettis. Pet. App. 14a. Refusing to presume competence, the

Ninth Circuit concluded, based upon the silent record,[2] that counsel did not make a reasonable professional judgment not to interview and call Pettis. Pet. App. 14a. The Ninth Circuit then found the state court adjudication unreasonable because the court "speculated that counsel might have had some 'tactical reason not to pursue Pettis as a witness'". Pet. App. 24a. The Ninth Circuit held "counsel cannot be presumed to have made an informed tactical decision." Pet. App. 25a.

Riley admits that *Strickland* "requires that Riley establish that [counsel's] performance fell below an objective standard of reasonableness." Br. Opp. 9. However, the remainder of Riley's discussion of this point illustrates how the burden of proof was shifted. According to Riley the Ninth Circuit concluded that "counsel cannot be *presumed* to have made an informed tactical decision on the undisputed facts of this case." Br. Opp. 9 (emphasis added). Of course the presumption applied by the Ninth Circuit was not the heavy measure of deference required by *Strickland* but the less deference standard. Riley goes on to explain that the state failed to put on evidence or request discovery. Br. Opp. 9. In other words, the less deference standard shifted the burden of proof from Riley to the government.

This shifting of the burden of proof is inconsistent with the approach taken by other

---

[2] The presumption of competence has particular force in cases, such as Riley's, where the ineffective assistance claim is based upon a record "in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a strategic motive." *Yarborough*, 124 S. Ct. at 5-6 (quoting *Massaro v. United States*, 538 U.S. 500 (2003)).

circuits. For example, in *Chandler v. United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000), the court explained that counsel's competence is presumed, and the habeas petitioner must rebut the presumption by proving counsel's representation fell below reasonable professional norms. *Id.* "An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption." *Id.* "Therefore, 'where the record is incomplete or unclear about [counsel's] actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment.'" *Id.* (quoting *Waters v. Thomas*, 46 F.3d 1506, 1516 (11th Cir. 1995) (*en banc*)). The presumption of competence, like the "presumption of innocence" in a criminal trial, continues throughout the habeas proceedings. *Chandler*, 218 F.3d at 1314 n.15. The habeas petitioner continually bears the burden of persuasion on the issue of competence. *Id.* "Never does the government acquire the burden to show competence, even when some evidence to the contrary might be offered by the petitioner." *Id.*

Riley bears the burden of proof. Riley must overcome the strong presumption that counsel chose not to interview and call Pettis "for tactical reasons rather than through sheer neglect." *Yarborough*, 124 S. Ct. at 5.

In the petition, we explained that shifting the burden of proof is significant because (1) it allows the reviewing court to second guess trial counsel's performance and is inconsistent with the Antiterrorism and Effective Death Penalty Act of 1996; (2) the government is in a poor position to explain trial counsel's strategy; and (3) claims of ineffective assistance of counsel based on trial

counsel's failure to interview and call witnesses are common and easily made. Pet. 13-16. Riley does not respond to these important reasons for granting the petition.

3. Summary Reversal Is Appropriate In This Case.

The Ninth Circuit's less deference rule is an aberration. Under this rule, counsel's performance is not entitled to a heavy measure of deference unless the lawyer personally interviews every witness he or she decides not to call to the witness stand. The less deference rule is inconsistent with *Strickland* and the decisions of the other courts of appeal. In light of this substantial deviation from this Court's precedent – that is well understood in other circuits – the Court should grant the petition and summarily reverse the decision below.

The Court has summarily reminded the federal courts of the level of deference owed to state court adjudication of ineffective assistance of counsel claims under 28 U.S.C. § 2254(d). *Yarborough v. Gentry*, 124 S. Ct. 1 (2003) (*per curiam*); *Holland v. Jackson*, 124 S. Ct. 2736, 2738-39 (2004) (*per curiam*); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). "If a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief if the decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Yarborough*, 124 S. Ct. at 4. "Where, as here, the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable." *Id.*

As the Court "explained in *Visciotti*, § 2254(d) requires that 'state-court decisions be given the benefit of the doubt.'" *Holland*, 124 S. Ct at 2739. "'[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law.'" *Id.* (quoting *Visciotti*, 537 U.S. at 24).

In Riley's case, the state courts reasonably concluded that counsel provided reasonably competent representation. The conclusion to the contrary "– not only that his performance was deficient, but that any disagreement with that conclusion would be objectively unreasonable – gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials." *Yarborough*, 124 S. Ct. at 7. Summary reversal of the Ninth Circuit's opinion is appropriate.

CONCLUSION

For the reasons stated herein, the petition should be granted and the decision below should be summarily reversed.

RESPECTFULLY SUBMITTED

CHRISTINE O. GREGOIRE
Attorney General
State of Washington
William Berggren Collins
Senior Assistant Attorney General
John J. Samson*
Assistant Attorney General
Paul D. Weisser
Senior Counsel
*Counsel of Record
PO Box 40116
Olympia, Washington 98504-0116
(360) 586-1445
July 2004